United States Court of Appeals
For the First Circuit

OCTOBER TERM, 1952.

ALICE D. JACOBSON, Admx.,

PLAINTIFF, APPELLANT,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS FROM JUDGMENT OF DISMISSAL (FORD, J.), JANUARY 19, 1953.

RECORD ON APPEAL.

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United States Court of Appeals
For the First Circuit

OCTOBER TERM, 1952.

ALICE D. JACOBSON, ADMX.,
PLAINTIFF, APPELLANT,
v.
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
DEFENDANT, APPELLEE.

RECORD ON APPEAL.

No. 52-303 Civil Action.

ALICE D. JACOBSON, ADMX.,
Plaintiff,
v.
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant.

APPEAL OF ALICE D. JACOBSON, ADMX., AS PLAINTIFF, FROM JUDGMENT OF DISMISSAL (FORD, J.), ENTERED JANUARY 19, 1953.

COMPLAINT.

[Filed March 18, 1952.]

A. The Plaintiff is the Administratrix of the estate of Margaret B. Price late deceased of Melrose, Massachusetts,

said Administratrix being also of Melrose, Massachusetts, and the Defendant is a Connecticut corporation duly organized by law and having a usual place of business at New Haven, Connecticut. The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

COUNT I. That on or about the second day of May, 1950, the Plaintiff's deceased, Margaret B. Price was a passenger of the Defendant en route from Lake Worth, Florida to Boston, Massachusetts, and while in the exercise of due care, she was caused to be thrown to the floor of one of the trains of the Defendant, due to the negligence of the Defendant, or those persons for whose conduct it was responsible.

As a result of being thrown to the floor of the train, the Plaintiff's intestate sustained injuries from which she died on the twenty-first day of May, 1950. And the Plaintiff says that an action has accrued to her as Administratrix for the pain and conscious suffering of the said late deceased, Margaret B. Price.

COUNT II. The Plaintiff says that on the second day of May, 1950, Margaret B. Price, of whose estate she is the duly appointed Administratrix, was a passenger on the railroad of the Defendant. That while riding in a car of the Defendant, she was severely and permanently injured due to the negligence of the Defendant in that its servants or agents so negligently and carelessly operated and controlled its railroad train so as to cause it to lurch and jolt throwing the Plaintiff's intestate to the floor, whereupon she sustained personal injuries which caused her to die on May 21, 1950. And the Plaintiff says that she brings this action to recover for the use of next of kin of said Margaret B. Price.

WHEREFORE, the Plaintiff demands judgment against the Defendant in the sum of Fifty Thousand Dollars.

Trial by jury is hereby claimed by the Plaintiff.

By her attorney,

(s) GEORGE P. LORDAN,
20 Pemberton Square,
Boston 8, Massachusetts

DEFENDANT'S MOTION TO DISMISS.

[Filed April 24, 1952.]

The defendant admits that it is a corporation duly organized under the laws of the State of Connecticut, but says that it is also a corporation duly organized under the laws of the Commonwealth of Massachusetts, and by reason thereof is a domestic corporation within the Commonwealth of Massachusetts.

Wherefore, the defendant moves that this action be dismissed, because there is no diversity of citizenship between the plaintiff and the defendant corporation.

By its Attorney,

(s) NOEL W. DEERING.

May 5, 1952

Motion denied: reasons fully stated in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F.2d 104.

(s) F. J. W. F.,
D. J.

The foregoing motion to dismiss came before the Court (Ford, J.) for hearing on May 5, 1952 and was taken under advisement. The motion was denied on the same day, as endorsed thereon.

MOTION FOR COURT TO REVOKE ORDER ON DEFENDANT'S MOTION TO DISMISS AND TO ENTER AN ORDER DISMISSING THE CASE FOR LACK OF JURISDICTION.

[Filed August 8, 1952.]

The defendant says that before pleading the merits in this case the defendant filed a motion to dismiss based upon lack of jurisdiction because there was no diversity of citizenship between the parties; that the defendant's motion was denied on May 5, 1952, "for the reasons fully stated in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F.2d, 104"; that on or about the 20th day of June, 1952, the Court of Appeals for the first Circuit handed down an opinion in the case of *Seavey* v. *B. & M. R.R. Co.* (believed as yet to be unreported), in which the Court of Appeals expressly refused to follow *Gavin* v. *Hundson & Manhattan R. Co.*, in this Circuit; that the case of *Seavey* v. *B. & M. R.R. Co.*, appears to involve an identical situation as to diversity as that involved in the instant case.

Wherefore, the defendant moves that the Court revoke its order, denying defendant's motion to dismiss, and that it dismiss the present action for lack of diversity of citizenship.

By its Attorney,

(s) NOEL W. DEERING.

On September 16, 1952, defendant's motion for rehearing of its motion to dismiss came before the Court (Ford, J.). The motion was allowed, unless an amendment was filed supporting jurisdiction. Thereafter, the following amended complaint was filed:

AMENDED COMPLAINT.

[Filed September 30, 1952.]

A. The Plaintiff is the Administratrix of the Estate of Margaret B. Price, late deceased of Melrose, Massachusetts, said Administratrix being also of Melrose, Massachusetts, and the Defendant is a Connecticut corporation duly organized by law and having a usual place of business at New Haven, Connecticut. The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

B. Jurisdiction herein in addition to diversity of citizenship is based on the existence of a question under the Federal Statutes known as the Safety Appliance Act Section 1 et seq. Title 45 U.S.C.A. hereinafter more fully appears.

C. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto railroad tracks, road bed, rails and ties and equipment within the various railroad cars and the Defendant so negligently and carelessly maintained and operated the brakes and braking equipment of said railroad train that as a result, the plaintiff's intestate, a passenger who was seated within one of the cars of said train was thrown out of her seat onto the floor of said car and sustained injuries from which she died. The Plaintiff says that she brings this action to recover for the use of next of kin of said Margaret B. Price.

D. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto, railroad tracks, road bed, rails and ties and equipment within the various railroad cars and the Defendant so negligently and carelessly maintained and operated the brakes and braking

equipment of said railroad train that as a result the Plaintiff's intestate, a passenger who was seated within one of the cars of said train was thrown out of her seat onto the floor of said car and sustained injuries from which she died. The Plaintiff says that an action has accrued to her as Administratrix for the conscious pain and suffering of the said late deceased Margaret B. Price.

E. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto, railroad tracks, road bed, rails and ties and equipment within the various railroad cars and the Defendant so negligently and carelessly maintained and operated the couplings on said cars that as a result the Plaintiff's intestate, a passenger who was seated within one of the cars of said train was thrown out of her seat on to the floor of said car and sustained injuries from which she died. The Plaintiff says that she brings this action to recover for the use of next of kin of said Margaret B. Price.

F. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto, railroad tracks, road bed, rails and ties and equipment within the various railroad cars and the defendant so negligently and carelessly maintained and operated the couplings on said cars that as a result the Plaintiff's intestate, a passenger who was seated within one of the cars of said train was thrown out of her seat onto the floor of said car and sustained injuries from which she died. The Plaintiff says that an action has accrued to her as Administratrix for the conscious pain and suffering of the said late deceased Margaret B. Price.

G. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto, railroad tracks, road bed, rails and ties and equipment within the various railroad cars and the Defendant so negligently and carelessly maintained the track and operated a train thereover, that said track was in a defective condition so that as a result thereof, the Plaintiff's intestate, who was a passenger in a car of said train was thrown to the floor and sustained injuries from which she died. The Plaintiff says that she brings this action to recover for the use of next of kin of said Margaret B. Price.

H. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto, railroad tracks, road bed, rails and ties and equipment within the various railroad cars and the defendant so negligently and carelessly maintained the track and operated a train thereover, that said track was in a defective condition so that as a result thereof, the Plaintiff's intestate, who was a passenger in a car of said train was thrown to the floor and sustained injuries from which she died. The Plaintiff says that an action has accrued to her as Administratrix for the conscious pain and suffering of the said late deceased Margaret B. Price.

I. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto, railroad tracks, road bed, rails and ties and equipment within the various railroad cars, to wit, a chair in which the Plaintiff's inte-

state, a passenger in said car was seated, and the Defendant so negligently and carelessly maintained said chair that as a result thereof, the Plaintiff's intestate was thrown to the floor and sustained injuries from which she died. The Plaintiff says that she brings this action to recover for the use of next of kin of said Margaret B. Price.

J. That on or about the 2nd day of May, 1950, the Defendant operated, maintained and controlled a railroad train consisting of an engine and cars running from Lake Worth to Boston and in addition thereto, railroad tracks, road bed, rails and ties and equipment within the various railroad cars, to wit, a chair in which the Plaintiff's intestate, a passenger in said car was seated, and the Defendant so negligently and carelessly maintained said chair that as a result thereof, the Plaintiff's intestate was thrown to the floor and sustained injuries from which she died. The Plaintiff says that an action has accrued to her as Administratrix for the conscious pain and suffering of the said late deceased Margaret B. Price.

K. That on or about the 2nd day of May, 1950, the Plaintiff's deceased, Margaret B. Price was a passenger of the Defendant en route from Lake Worth, Florida to Boston, Massachusetts, and while in the exercise of due care, she was caused to be thrown to the floor of one of the trains of the Defendant, due to the negligence of the Defendant, or those persons for whose conduct it was responsible.

As a result of being thrown to the floor of the train, the Plaintiff's intestate sustained injuries from which she died on the twenty-first day of May, 1950. And the Plaintiff says that an action has accrued to her as Administratrix for the pain and conscious suffering of the said late deceased, Margaret B. Price.

L. The Plaintiff says that on the 2nd day of May, 1950,

Margaret B. Price, of whose estate she is the duly appointed Administratrix, was a passenger on the railroad of the Defendant. That while riding in a car of the Defendant, she was severely and permanently injured due to the negligence of the Defendant in that its servants or agents so negligently and carelessly operated and controlled its railroad train so as to cause it to lurch and jolt throwing the Plaintiff's intestate to the floor, whereupon she sustained personal injuries which caused her to die on May 21, 1950. And the Plaintiff says that she brings this action to recover for the use of next of kin of said Margaret B. Price.

WHEREFORE, the Plaintiff demands judgment against the Defendant in the sum of Fifty Thouand Dollars.

Trial by jury is hereby claimed by the Plaintiff.

By Her Attorney,

(s) GEORGE P. LORDAN, by H.E.T.

DEFENDANT'S MOTION TO DISMISS.

[Filed October 10, 1952.]

The defendant moves that this action be dismissed for the reason that in the absence of diversity of citizenship this Court lacks jurisdiction of the subject matter of this action as set forth in plaintiff's amended complaint.

By its Attorney,

(s) NOEL W. DEERING.

On January 5, 1953, the foregoing motion to dismiss came before the Court (Ford, J.). After hearing and arguments, the matter was taken under advisement.

JUDGMENT FOR DISMISSAL.

[Entered January 19, 1953.]

FORD, J. After hearing on defendant's motion to dismiss in the above entitled action, and in accordance with Memorandum of Decision handed down this day, it is ORDERED

Defendant's motion to dismiss allowed,

Action dismissed, with costs to defendant taxed at $.

By the Court,

(s) FRANCES R. FOLEY,
Deputy Clerk.

Jan. 19-'53.
FORD,
U. S. D. J.

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO DISMISS.

[January 19, 1953.]

FORD, D.J.

This is an action to recover for the death of plaintiff's decedent, alleged to have resulted from injuries received when she was thrown from her seat onto the floor of a car in defendant's train in which she was traveling as a passenger from Lake Worth, Florida, to Boston. Defendant moves to dismiss for lack of jurisdiction.

There is no diversity of citizenship, and the sole question is whether the allegations in the complaint of violation by the defendant of the Safety Appliances Acts, 45 U.S.C.A., §§ 1, et seq., make the cause of action one arising under the laws of the United States, 28 U.S.C.A., § 1331.

To make a case one arising under the laws of the United States, the right sought to be enforced should be a federal

one. *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476, 483. It is not enough that in an action to enforce a right arising under state law or statute, a question of federal law is involved. *Gully* v. *First National Bank in Meridian*, 299 U.S. 109, 115.

The Safety Appliances Acts make violation of their prohibitions unlawful, and provide a penalty for such violations, but they nowhere confer any right of action for injuries or death caused by such violations. *Urie* v. *Thompson*, 337 U.S. 163, 188. While the Acts thus prescribe a duty, the right to recover for injuries suffered through a breach of such duty springs either from the common law or, in the case of a death action, from the applicable statute. *Moore* v. *Chesapeake & Ohio Railway Co.*, 291 U.S. 205, 215. Thus, as the *Moore* case points out, an employee of a railroad suffering injury while employed in interstate commerce can rely on a violation of the Safety Appliances Acts in an action in a federal court under the Employers' Liability Acts, 45 U.S.C.A., §§ 51 *et seq.* But it is the latter Acts, and not the Safety Appliances Acts which create the right of action, and make the case one arising under the laws of the United States. Where the employee is injured in intrastate commerce the Employers' Liability Acts are no longer applicable, and while he may still rely on the breach of the duty imposed by the Safety Appliances Acts, his only right of action is that which is conferred by the applicable state statute or law. *Gilvary* v. *Cuyahoga Valley Railway Co.*, 292 U.S. 57, 61; *Tipton* v. *Atchison, Topeka and Santa Fe Railway Co.*, 78 F. (2d) 450.

It is true that the Safety Appliances Acts were intended for the protection of passengers as well as employees of the railroads. *Fairport, Painesville & Eastern Railroad Co.* v. *Meredith*, 292 U.S. 589, 594. But no federal statute confers any right of action for the death of a passenger resulting

from a violation of the Acts. Any right of plaintiff to recover arises under the applicable death statute of the appropriate state (the state in which injuries causing the death were sustained is not stated in the complaint), and the fact that plaintiff may be entitled in an action brought under such a statue to rely on the violation of the duty imposed by the Safety Appliances Acts does not make this a case arising under the laws of the United States. *Moore* v. *Chesapeake & Ohio Railway Co., supra,* at p. 214.

Defendant's motion to dismiss is allowed.

APPEAL TO COURT OF APPEALS UNDER RULE 73 (B).

[Filed February 11, 1953.]

Notice is hereby given that Alice D. Jacobson, Administratrix of the Estate of Margaret B. Price (plaintiff) above named hereby appeals to the United States Court of Appeals for the First Circuit from Judgment entered in this action on January 19, 1953.

CARDOZO, LORDAN, KATZ & TUCKER,
By (s) GEORGE P. LORDAN,
Plaintiff.

[MEMORANDUM: On February 11, 1953, the appellant filed a Bond for Costs in the sum of $250.00, with the New Amsterdam Casualty Co. as surety thereon.

JOHN A. CANAVAN, *Clerk.*]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

[Filed February 25, 1953.]

The Appellant, Alice Jacobson, Administratrix of the Estate of Margaret B. Price, hereby designates the following portions of the record to be contained in the record of appeal.

1. Amended Complaint.
2. Defendant's Motion to Dismiss the Amended Complaint.
3. Memorandum of Decision Allowing Motion to Dismiss.
4. Allowance of Motion to Dismiss.
5. Entry of Judgment for the Defendant.

ALICE JACOBSON, *Admx.*
Appellant.
By (s) GEORGE P. LORDAN, HET.
Attorney.

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD.

[Filed March 4, 1953.]

The Appellee, New York, New Haven and Hartford Railroad Company, hereby designates the following additional portions of the record to be contained in the record of appeal:

(1) The Original Complaint.

(2) Defendant's First Motion to Dismiss.

(3) The Court's Order on Defendant's First Motion to Dismiss.

(4) Defendant's Motion for Court to Revoke Order on Defendant's Motion to Dismiss and to Enter an Order Dismissing the Case for lack of Jurisdiction.

(5) The Order of the Court on the Foregoing Motion.

By its Attorney,

(s) NOEL W. DEERING.

DESIGNATION OF ISSUES UNDER RULE 22(6) OF THE CIRCUIT COURT OF APPEALS.

[Filed March 6, 1953.]

The Appellant, Alice Jacobson, Administratrix, hereby designates the following issues:

1. Was there a diversity of citizenship so as to give the District Court jurisdiction of the cause of action as set forth in the Amended Complaint.

2. Does the Safety Appliance Act confer a right for actions for injuries and death caused by the violation thereof as set forth in this Bill of Complaint.

ALICE JACOBSON, *Administratrix, Appellant,*

By her Attorneys,

CARDOZO, LORDAN, KATZ & TUCKER,

By (s) GEORGE P. LORDAN.

[MEMORANDUM: Order of enlargement of time in the District Court for docketing case to and including April 22, 1953 is here omitted. JOHN A. CANAVAN, *Clerk.*]

CLERK'S CERTIFICATE.

I, John A. Canavan, Clerk of the United States District Court for the District of Massachusetts, do hereby certify that the foregoing is a true copy of the matter designated by the parties and constitutes the record on appeal in the cause entitled:

ALICE D. JACOBSON, ADMX.,
Plaintiff,

v.

NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,
Defendant.

in said District Court determined.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Boston in said District, this 25th day of March, 1953.

[SEAL] JOHN A. CANAVAN, *Clerk.*

[fol. 16] UNTED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1952

No. 4726

ALICE D. JACOBSON, Admx., Plaintiff, Appellant,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellee

Appeal from the United States District Court for the District of Massachusetts

[109 F. Supp. 513]

Before MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges

Herbert E. Tucker, Jr., with whom George P. Lordan and Cardozo, Lordan, Katz & Tucker were on brief, for appellant.

Noel W. Deering for appellee.

OPINION OF THE COURT—July 14, 1953

MAGRUDER, Chief Judge:

The original complaint in this case stated an action in tort for negligence. In an effort to base federal jurisdiction on diversity of citizenship, the pleader set forth that plaintiff sued as administratrix of the estate of Margaret B. Price; that both plaintiff and her intestate were of Melrose, Massachusetts; that defendant, New York, New Haven and [fol. 17] Hartford Railroad Company, was a Connecticut corporation. It was alleged that on May 2, 1950, Margaret B. Price was a passenger of defendant en route from Lake Worth, Florida, to Boston, Mass., and that during the journey she was, due to defendant's negligence, thrown to the floor by a lurch or jolt of the train, from which she received bodily injuries of which she died on May 21, 1950. Count 1 sought damages for conscious pain and suffering. Count 2 sought damages for wrongful death on behalf of

the next of kin. The complaint did not state where the accident occurred, but counsel for appellant informed us at the oral argument that it took place in Boston.

Defendant filed a motion to dismiss the complaint for lack of diversity of citizenship, setting forth that defendant "is also a corporation duly organized under the laws of the Commonwealth of Massachusetts, and by reason thereof is a domestic corporation within the Commonwealth of Massachusetts." This motion the district court allowed, on the authority of *Seavey* v. *Boston & Maine R. R. Co.*, 197 F. 2d 485 (C. A. 1st, 1952), with leave to plaintiff to file an amended complaint supporting federal jurisdiction.

Thereafter, plaintiff filed an amended complaint setting forth, in addition to the claim of diversity of citizenship, that jurisdiction "is based on the existence of a question under the Federal Statutes known as the Safety Appliance Act Section 1 et seq. Title 45 U. S. C. A. [as] hereinafter more fully appears." In support of that basis of jurisdiction, it was alleged that defendant so negligently and carelessly maintained and operated the brakes and couplings that as a result intestate was thrown out of her seat and received the injuries of which she died.

The district court granted a motion of defendant to dismiss the amended complaint for lack of jurisdiction of the subject matter of the action. Its memorandum of decision [fol. 18] is reported in 109 F. Supp. 513. Plaintiff has appealed from the ensuing judgment of dismissal.

Appellant's main point is that the complaint properly invoked the jurisdiction of the district court under 28 U. S. C. § 1332 on the ground of diversity of citizenship, and that we ought to overrule our holding just a year ago in *Seavey* v. *Boston & Maine R. R. Co., supra.* Our decision in that case was carefully considered, and we adhere to it. In the present case a citizen of Massachusetts is suing a corporation incorporated under the laws of Massachusetts on an alleged tort occurring in Massachusetts and governed in its substantive aspects by the local law of Massachusetts. Bearing in mind the underlying purpose of the diversity of citizenship clause in Art. III of the Constitution, we see no reason why we should strain to pull this case in the United States District Court for the District of Massachusetts merely because the defendant corporation is also incorpo-

rated under the laws of Connecticut. In the *Seavey* case, we recognized that our view was not in harmony with that taken in *Gavin* v. *Hudson & Manhattan R. R. Co.*, 185 F. 2d 104 (C. A. 3d, 1950); but as Judge Goodrich has recently remarked, in another connection, in *McCoy* v. *Siler* (C. A. 3d, June 10, 1953): "The only policy consideration which is apparent is that we should not be astute to widen federal diversity jurisdiction."

Also, we think the district court was right in its conclusion that the subject matter of the cause of action stated in plaintiff's amended complaint, invoking the Safety Appliance Acts (45 U. S. C. § 1 *et seq.*) was not within the jurisdiction of the court under 28 U. S. C. § 1331.

By way of enforcement of the duties imposed by the Safety Appliance Acts, Congress merely imposed a small statutory penalty, to be recovered in a suit brought by the United States; in terms, at least, the Safety Appliance Acts [fol. 19] confer no right of action for damages in favor of any individual suffering personal injuries as a result of violation of the various safety provisions.

But the federal Employers' Liability Acts (45 U. S. C. § 51 *et seq.*) do grant a federal statutory right of action to railroad employees suffering injury while employed in interstate commerce, as defined, and in the case of the death of such employee to his personal representative for the benefit of his next of kin, for such injury or death resulting in whole or in part from the negligence of the carrier, "or by reason of any defect or insufficiency, due to its negligence," in its cars, appliances or other equipment. And it is settled that the federal Safety Appliance Acts and the Employers' Liability Acts are *in pari materia;* and when a railroad employee is entitled to sue under the Employers' Liability Acts he may recover without other proof of fault than a violation of a so-called "absolute duty" imposed by the Safety Appliance Acts. As stated in *San Antonio etc. Ry. Co.* v. *Wagner*, 241 U. S. 476, 484 (1916): "But the two statutes are *in pari materia*, and where the Employers' Liability Act refers to 'any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se.*" To the same effect see *Moore* v. *Chesa-*

peake & Ohio Ry. Co., 291 U. S. 205, 210 (1934); *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10, 15 (1938); *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U. S. 384, 390 (1949); *Carter* v. *Atlanta etc. Ry. Co.*, 338 U. S. 430, 434 (1949). The cause of action in a suit under the Employers' Liability Acts is a federal one, governed in its entirety by acts of Congress or by federal decisional law—in other words, by the provisions of the federal statutes so far as applicable, fitted into the common law background with respect to concepts of [fol. 20] negligence, contributory negligence, last clear chance, assumption of risk, proximate cause, etc., as the federal common law doctrines in such particulars are determined and declared by decisions of the federal courts. See *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44, 46-47 (1931); *Bailey* v. *Central Vt. Ry., Inc.*, 319 U. S. 350, 352 (1943); *Dice* v. *Akron, C. & Y. R. R. Co.*, 342 U. S. 359 (1952).

It is true, as the Supreme Court has many times pointed out, that the classes of persons for whose protection the Safety Appliance Acts were passed include more than railroad employees, engaged in interstate commerce, as defined, who are given federal statutory rights of action by the Employers' Liability Acts. This is evident in the original act of March 2, 1893, which was entitled an act "to promote the safety of employees and travelers upon railroads . . . " (27 Stat. 531). Compliance with the statutory safeguards, in addition to protecting employees engaged in interstate commerce, would also tend in many cases to contribute to the personal safety of intrastate employees. See *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57 (1934). Compliance with the acts would also tend to protect passengers, such as the plaintiff's intestate in the case at bar. See *Fairport etc. R. R. Co.* v. *Meredith*, 292 U. S. 589, 594 (1934). In the latter case it was further held (at p. 595) that the title of the act need not necessarily be taken as indicating the complete legislative purpose; and that the installation and use of power brakes, as required by the Safety Appliance Acts, "so obviously contribute to the safety of the traveler at crossings that it is hardly probable that Congress could have contemplated their inapplicability to that situation."

When Congress in the Safety Appliance Acts imposed only penal sanctions for the observance of statutory safeguards

[fol. 21] enacted broadly for the protection of railway employees, passengers, and even travelers at crossings, and in a related act (the Employers' Liability Acts) created a private right of action only in employees engaged in interstate commerce, as defined, fairly obviously it cannot be maintained as a matter of statutory interpretation that Congress has also created a statutory right of action in favor of intrastate railway employees, or passengers, or travelers at crossings, injured as a result of violation by the railroad of the Safety Appliance Acts. "Where there is only a criminal penalty, and no mention of any civil remedy, many courts have read into the statute a supposed or 'presumed' intent to provide one. In the ordinary case this is pure fiction, since the obvious conclusion is that the legislature either did not have the civil action in mind at all, or deliberately omitted to provide for it." Prosser on Torts (1941) 265. This was squarely recognized in *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57 (1934). Furthermore, the Court there commented (at p. 61) that if Congress had had the purpose of creating a right of action in favor of persons not covered by the Employers' Liability Acts, "Congress probably would have included provisions in respect of venue, jurisdiction of courts, limitations, measure of damages, and beneficiaries in case of death."

But though Congress has not created a statutory right of action in favor of passengers injured as a result of violation of the Safety Appliance Acts, it is still possible for the courts to do so on principles of the common law. The breach of a penal statute may be regarded by the courts as a relevant operative fact upon the basis of which may be predicated a common law tort liability to a person injured as a result of the breach, provided he is within the class for whose protection the penal statute presumably was passed. The courts of the various states differ extensively in their [fol. 22] formulation and application of the common law principle upon which a liability is created in favor of a person injured by breach of a criminal statute. Some courts speak of the breach as "negligence *per se*", others as "evidence of negligence" or as "prima facie evidence of negligence." Nor are they completely in agreement as to what is meant by these phrases. Furthermore, liability in such cases is fitted into whatever local variations there may be in

common law doctrines as to contributory negligence, last clear chance, assumption of risk, proximate cause, etc.

The common law principle referred to in the previous paragraph was broadly stated in the leading case of *Texas & Pac. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916), as follows: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law. . . ." If the federal courts had undertaken to apply this principle as a matter of federal decisional law, in the case of a breach of the Safety Appliance Acts resulting in personal injury to a person not entitled to sue under the Employers' Liability Acts, and if such liability had been imposed as a matter of federal common law without reference to local variation of statutory law or of common law doctrine applicable in the state where the injury occurred, it would perhaps follow that a complaint setting up such a liability would be a civil action arising "under the Constitution, laws or treaties of the United States" within the meaning of 28 U. S. C. § 1331. See *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C. A. 2d, 1947); *Mater* v. *Holley*, 200 F. 2d 123 (C. A. 5th, 1952). Cf. *Odell* v. *Humble Oil & Ref. Co.*, 201 F. 2d 123 (C. A. 10th, 1953); *Doucette* v. *Vincent*, 194 F. 2d 834, 839 *et seq.* (C. A. [fol. 23] 1st, 1952). See also *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 71-73 (1938).

But it is abundantly clear that the federal courts have not, as a matter of federal common law, developed a private right of action for damages for personal injuries resulting from a breach of the Safety Appliance Acts, in favor of persons not entitled to sue under the provisions of the Employers' Liability Acts. This is apparent from examination of the following cases, among others: *Minneapolis, St. Paul etc. Ry. Co.* v. *Popplar* 237 U. S. 369 (1915); *Moore* v. *Chesapeake & Ohio Ry. Co.* 291 U. S. 205 (1934); *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57 (1934); *Fairport etc. R. R. Co.* v. *Meredith*, 292 U. S. 589 (1934); *Tipton* v. *Atchison, T. & S. F. Ry. Co.*, 298 U. S. 141 (1936); *Breisch* v. *Central R. R. of New Jersey*, 312 U. S. 484 (1941); *Andersen* v. *Bingham & G. Ry. Co.*, 169 F. 2d 328 (C. A. 10th, 1948).

It follows, therefore, that if an action is brought in a state court by a passenger or other person not entitled to sue under the Employers' Liability Acts to recover damages for personal injury resulting from a violation of the Safety Appliance Acts, issues bearing upon the right to recover, relating, for example, to common law doctrines of last clear chance, the defense of contributory negligence, or proximate cause, depend upon the local law of the state where the injury occurred, and do not present federal questions reviewable by the Supreme Court under 28 U. S. C. § 1257(3). See *Minneapolis, St. Paul etc. Ry. Co.* v. *Popplar, supra; Fairport etc. R. R. Co.* v. *Meredith, supra* at 597-98. However, questions arising in such state court actions "relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed" by the Supreme Court on certiorari. *Moore* v. *Chesapeake & Ohio Ry. Co., supra* at 214. [fol. 24] This is well settled, whatever may be the theoretical difficulties presented. See 66 Harv. L. Rev. 1499 *et seq.* (1953).

It follows also, that if such an action is brought in or removed to a federal district court on grounds of diversity of citizenship, the substantive law to be applied, in determining the right to recover, is the statutory or common law of the state. *Tipton* v. *Atchison, T. & S. F. Ry. Co., supra; Breisch* v. *Central R. R. of New Jersey, supra.* And if there is no applicable state statute, the federal courts, since *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), must apply the state common law as declared in the state courts.

Furthermore, it follows that where there is no diversity of citizenship such an action cannot be maintained in a federal district court, since the liability for damages and the corresponding private right of action, if any, are created by state law. *Tipton* v. *Atchison, T. & S. F. Ry. Co., supra; Andersen* v. *Bingham & G. Ry. Co., supra; Moore* v. *Chesapeake & Ohio Ry. Co., supra.* Perhaps some of the language in *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33 (1916), is susceptible of misunderstanding. There, an action in a state court by an intrastate employee was removed to a federal district court, though so far as appears there was no claim of diversity of citizenship. However, Chief Justice Hughes was careful to point out in *Moore* v. *Chesapeake & Ohio Ry.*

Co., supra, in the footnote at p. 215, that in the *Rigsby* case the action "was removed to the federal court upon the ground that defendant was a federal corporation." See *Texas & Pac. Ry. Co.* v. *Kirk,* 115 U. S. 2, 11 (1885).

Of course there would be nothing incongruous if a state, as part of its local common law of torts, should impose a liability in favor of an intrastate employee, or of a passenger, suffering injuries within the state as a result of a breach by the railroad of a penal law enacted by Congress in part [fol. 25] for the protection of such persons. The federal Safety Appliance Acts, under the supremacy clause, are part of the law of the land, fully applicable within the borders of the state; and the state courts, in formulating their local rules of tort liability, might well give the same significance to a breach of a penal act of Congress that they would give to a breach of a similar act of their state legislature. But the point is that the extent and conditions of any such liability would be a matter of local law. And it is well settled that in the case of intrastate employees injured as a result of a breach of the federal Safety Appliance Acts, the state legislatures have constitutional power to abolish altogether any common law right of action for damages, and to substitute an exclusive remedy under the state workmen's compensation act. *Gilvary* v. *Cuyahoga Valley Ry. Co., supra; Tipton* v. *Atchison, T. & S. F. Ry. Co., supra; Breisch* v. *Central R. R. of New Jersey, supra.* This the state legislatures would have no power to do if the injured intrastate employee had a paramount right of action for damages created either by the federal Safety Appliance Acts or by federal decisional law treating the breach of the penal statute as one of the operative facts.

It is also worth noting that in the case at bar, according to the allegations in the complaint, plaintiff's intestate died as a result of the injuries received. The complaint sought recovery by the administratrix (1) for the benefit of the next of kin on account of the wrongful death, and (2) for the benefit of the estate on account of conscious pain and suffering prior to death. As to the count for death, there is certainly no applicable federal wrongful death act giving such a right of action for the death of a passenger. The wrongful death provision of the federal Employers' Liability Act (45 U. S. C. § 51) is inapplicable. Recovery on

this count would obviously have to be based on the Massa-[fol. 26] chusetts wrongful death act, C. 229, Mass. G. L. (Ter. ed.), as amended. As to the count for conscious pain and suffering, it has from ancient times been the settled common law rule that tort actions did not survive the death of either the plaintiff or the defendant. See Prosser on Torts (1941) § 103. The survival provision of the federal Employers' Liability Act (45 U. S. C. § 59) is of course inapplicable to passengers. Any recovery, therefore, by the administratrix for the intestate's conscious pain and suffering accruing prior to death as a result of the tort, could be sustained, if at all, only under the provisions for survival of actions in C. 228, Mass. G. L. (Ter. ed.) This all goes to reinforce our conclusion that the subject matter of the cause of action stated in the amended complaint was not within the jurisdiction of the court below under 28 U. S. C. § 1331. It was not a civil action arising "under the Constitution, laws or treaties of the United States."

The judgment of the District Court is affirmed.

[fol. 27] PROCEEDINGS IN COURT OF APPEALS

On the same day, July 14, 1953, the following judgment was entered:

JUDGMENT—July 14, 1953

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court: (S.) Roger A. Stinchfield, Clerk.

Thereafter, to wit, on July 29, 1953, mandate was stayed until further order of Court.

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 29] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 404

ALICE D. JACOBSON, Administratrix, Petitioner,

vs.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—Filed November 30, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted limited to question No. 1, presented by the petition for the writ which reads as follows:

"Was there diversity of citizenship even though the defendant (a multiple corporation) was also incorporated in Massachusetts, which would confer jurisdiction upon the United States District Court for the District of Massachusetts?"

The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1953)

3

OCT 9 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

No. 404 October Term, 1953.

ALICE D. JACOBSON, ADMX.,
Petitioner,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON JURISDICTION OF THE DISTRICT COURT.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

GEORGE P. LORDAN,
Attorney for Petitioner.

Herbert E. Tucker, Jr.,
Michael Carchia,
Cardozo, Lordan, Katz & Tucker,
Of Counsel.

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Supreme Court of the United States.

No. October Term, 1953.

ALICE D. JACOBSON, Admx.
Petitioner,

v.

NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY,
Respondent.

ON JURISDICTION OF THE DISTRICT COURT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, by George P. Lordan, her attorney, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit rendered July 14, 1953. The judgment affirms the judg-

ment of the United States District Court, District of Massachusetts, which allowed the defendant's motion for dismissal for lack of jurisdiction.

Jurisdiction.

The basis of jurisdiction is diversity of citizenship and violation of the Safety Appliance Acts 45 U.S.C.A. Sec. 1-4 and seq. by the defendant.

Summary Statement of Matters Involved.

This is an action to recover for the death and conscious suffering of the plaintiff's decedent, alleged to have resulted from injuries received while travelling as a passenger in the train of the defendant from Lake Worth, Florida to Boston.

The original complaint and the amended complaint both alleged diversity of citizenship. The plaintiff being described as of Massachusetts and the defendant corporation as of Connecticut. The defendant filed a motion to dismiss the complaint for lack of diversity of citizenship setting forth that the defendant is also a corporation duly organized under the laws of Massachusetts and by reason thereof there is no diversity of citizenship. This motion was denied, after hearing, upon the authority of *Gavin* v. *Hudson and Manhattan R.R. Co.*, 185 Federal (2) 104.

On August 8, 1952, the defendant filed a motion to revoke the order of the Court on the earlier motion to dismiss. This motion, the District Court allowed upon the authority of *Seavey* v. *Boston and Maine R.R. Co.*, 197 Fed (2nd) 485 (C.A. 1st 1952) with leave to the plaintiff to file an amended complaint supporting federal jurisdiction.

The plaintiff then filed an amended complaint containing

the same allegations as to diversity of citizenship and in addition thereto, various violations of the Safety Appliance Act and stated that jurisdiction is based upon the diversity of citizenship and the existence of a question under the Safety Appliance Act.

The District Court thereafter allowed a motion to dismiss for lack of jurisdiction and a subsequent judgment of dismissal. The plaintiff thereafter appealed to the United States Court of Appeals for the First Circuit which affirmed, and she now seeks to have the judgment reviewed.

Questions Presented.

1. Was there diversity of citizenship even though the defendant (a multiple corporation) was also incorporated in Massachusetts, which would confer jurisdiction upon the United States District Court for the District of Massachusetts?

2. Is the decision of *Seavey* v. *Boston and Maine R.R. Co.*, 197 Federal (2nd) 485 (C.A. 1st 1952) in conflict with the earlier decision of *Gavin* v. *Hudson and Manhattan R.R. Co.*, 185 Fed. (2nd) 104 (C.A. 3rd 1950)? If so should this conflict be resolved?

3. Was there jurisdiction under the Safety Appliance Act in the United States District Court for the District of Massachusetts to hear this complaint?

The Reasons Advanced for the Allowance of the Writ.

1. The concept of corporate citizenship is a judicial fiction which has been criticized severely. By force of logic, corporate citizenship, like the citizenship of a natural person, should be restricted so that the corporation can

be the citizen of only one state and only one country. It, therefore, by reason of multiple incorporation, cannot become a citizen in each state in which it becomes incorporated, because then it would have privileges far greater than a natural person who is limited to one citizenship. Its citizenship therefore should be confined to the state of origin of said corporation, in this case the State of Connecticut.

2. The reasoning in the case of *Gavin* v. *Hudson and Manhattan R.R. Co.*, 185 Fed. (2nd) 104 (C.A. 3rd 1950) is much sounder than in the Seavey case, and it should be adopted. The doctrine of the Seavey case makes jurisdiction a matter of having the necessary transportation fare.

3. The violation of the Safety Appliance Act without more does give jurisdiction to the United States District Court for the District of Massachusetts of a cause of action showing injuries as a result of said violation.

BRIEF IN SUPPORT OF PETITION.

POINT I.

There was diversity of citizenship sufficient to give the Federal District Court for Massachusetts jurisdiction to hear the complaint.

The complainant in this case is a citizen of Massachusetts. The defendant is a railroad incorporated first in Connecticut and thereafter in Massachusetts. The District Court for Massachusetts declined jurisdiction.

A corporation being a legal entity has citizenship only by a judicial fiction. It has been determined by this Honorable Court that citizenship of a corporation was that of the state originally creating or chartering it.

St. Louis v. *James* 161 U.S. 545 16 Supreme Court Reporter 621.

In this case, the state of original charter is Connecticut. Public Acts of Connecticut Vol 1866-1871 Page 713 Chapter CXXIX Acts of 1871. The railroad was organized as a corporation under Massachusetts Special Acts of 1872, Chapter 171.

The learned District Judge in declining jurisdiction stated that there was no diversity of citizenship (Record on Appeal Page 10). This in effect made the defendant railroad a citizen in both states. Not only is this result opposed to the case of *St. Louis* v. *James*, supra, but it is also extending the legal fiction of citizenship far beyond common sense.

To allow a multi-state corporation to be a citizen in each of the states where it is incorporated is to give this artificial being benefits which a natural person cannot claim. As a natural person can have only one citizenship, why should this legal being created by the mind or minds have more citizenship than its creators.

It is suggested that there was diversity of citizenship sufficient to give the United States District Court for the District of Massachusetts jurisdiction.

POINT II.

The reasoning in the case *Gavin* v. *Hudson and Manhattan R.R. Co.*, 185 Fed. (2nd) 104 (C.A. 3rd 1950) is much sounder than that of the case of *Seavey* v. *Boston and Maine R.R. Co.*, 197 Fed. (2nd) 485 (C.A. 1st 1952).

The Seavey case is based upon the reasoning of the United States Court of Appeals for the First Circuit as expressed in the doctrine viz:

> "A corporation incorporated in several states including the one in which a suit is brought against it,

must be regarded as a citizen of the latter state for the purpose of determining the jurisdiction of the Federal Court".

Goodwin v. *N.Y. N.H. & H. R.R.*, 124 Federal 358.
Lake Shore & M.S. Ry. v. *Eder*, 174 Fed. 944.
Geoffrey v. *N.Y. N.H. & H. R.R.*, 16 Fed. (2nd) 1017.
Peterborough R.R. v. *Boston and Maine R.R.*, 239 Fed. (2nd) 97.

But a citizen of Massachusetts can sue the defendant railroad in the State of Connecticut.

Boston and Maine R.R. v. *Breslin* 80 Fed. (2nd) 949 certiorari denied 297 U.S. 715 56 Supreme Court Reporter 590.

This type of reasoning is consistent with the principle previously enunciated regarding "a corporation as a citizen of the state in which suit is brought for the purpose of Federal Jurisdiction. Its net result is to make jurisdiction a matter of having the necessary transportation fare. As stated in the Gavin case, "Such a rule if adopted, may be an effective means of promoting additional passenger business but it would be pretty hard to explain to the layman".

It is suggested that the reasoning of the Circuit Court of Appeals in the Gavin case (Third Circuit) states the problem fairly.

"Thus assuming, of course, that the jurisdictional amount is involved, a citizen of State X can sue a corporation organized under the laws of State Y in the United States District Court for the district of Y

even though the corporate defendant is organized under the laws of State X."

In view of the line of cases so holding, the Court in the *Gavin* case found it incongruous to hold that a citizen of State Y could not sue the corporate defendant also organized in State X in the Federal District Court for the District of X.

Seavey v. *Boston and Maine R.R. supra.*

There is another reason why the Federal District Court for Massachusetts should take jurisdiction where the plaintiff is from Massachusetts. Would not the Jurors from the District of Massachusetts better understand her cause than those from Connecticut? Would they not be in a better position to assess damages than the jurors from Connecticut? Why should the plaintiff be compelled, in order to get into the Federal District Court, to go into another district and among strangers?

There has been no decision on this point from the Supreme Court of the United States. The question can be argued from both sides. The decisions which seem to favor jurisdiction in the Federal Court are:

Southern R.R. v. *Allison* 190 U.S. 326
Nashua & Lowell R.R. v. *Boston & Lowell R.R.* 136 U.S. 356
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Louisville N.A. & C. R. Co. v. *Louisville Trust Co.*, 174 U.S. 552

Those against jurisdiction are:

Chicago etc. R. Co. v. *Whitton* 13 Wall 283
Memphis & C. R. Co. v. *State of Alabama*, 107 U.S. 581
Patch v. *Wabash R.R.* 207 U.S. 277

Starke v. *New York Chicago & St. Louis* 180 Fed. (2nd) 569

It is submitted however that the concept of citizenship as based upon the diversity clause and applied to corporations is now outmoded and no longer has any basis in logic or reality. The multi-state corporation whether it becomes one by merger, by filing of its charter or voluntary application is still essentially the same railroad. It would appear as suggested in the Gavin case that the rule declining jurisdiction should be re-examined.

In addition to the reasons already advance we would cite the rule cited in the Restatement 203-207 to wit:

Suits may be brought by and against multiple corporations in any of the incorporating states.

We suggest to this Honorable Court that this is the better rule and that it was error for the learned District Court Judge to allow the motion to dismiss and the judgment should be reversed.

POINT III.

The violation of the Safety Appliance Act without more does give jurisdiction to the United States for the district of Massachusetts of a cause of action showing injuries as a result of said violation.

In a perusal of the cases cited by the District Judge in his memorandum of decision covered the cases brought by employees against various railroads, it is to be noted that there is no United States Supreme Court decision in this matter, wherein a passenger who is injured brought suit under the Safety Appliance Acts in the Federal Court. The proposition therefore is a new one.

The one case which is the closest to this proposition is

that of *Fairport P & E R.R. Co.* v. *Meredith*, 292 U.S. 589, wherein the respondent Meredith recovered judgment against the petitioner as a result of a collision between an automobile she was driving and a train of the petitioner at a railroad-highway crossing. It was there held that the Safety Appliance Act did apply and that the purpose of the Act was to protect. In addition to employees and passengers, it applied to travellers and this being so there is a Federal question which is reviewable by the United States Supreme Court; See *Puerto Rico* v. *Russell*, 288 United States 476 and *Moore* v. *Chesapeake & Ohio R.R. Co.*, 291 United States 215. To deprive the Federal District Court of civil jurisdiction of a violation of this Act seems to be illogical.

It is true that the Act does not set forth what rights accrue thereunder, the persons who are to benefit from it and wherein one may obtain jurisdiction and venue, but this lack of provision does not in our judgment deprive the District Court of jurisdiction of this complaint. The Federal Courts are not solely courts of statutory authority in the sense that they entertain only causes of action or rights credited by Federal Statute. The Federal Court is also a common law court and what better place is there to interpret a Federal Question than in the Federal Court. To continue to refuse jurisdiction as set forth in the memorandum of decision on the defendant's motion to dismiss; (See record 10, 11 and 12) would be to compel a litigant to go to the state courts for relief in a case involving a violation of the Safety Appliance Act. This result, in our judgment, was never intended by Congress.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE P. LORDAN,
Attorney for Petitioner.

HERBERT E. TUCKER, JR.,
MICHAEL CARCHIA,
CARDOZO, LORDAN, KATZ & TUCKER,
of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 404.

ALICE D. JACOBSON, ADMINISTRATRIX,
Petitioner,
v.
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The petitioner seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit affirming a judgment for dismissal entered in the United States District Court for the District of Massachusetts on January 19, 1953 (R. 10). The opinion of the United States Court of Appeals is reported, *Jacobson* v. *New York, New Haven & Hartford Railroad Co.*, 206 F. (2d) 153, and that of the District Court, 109 Fed. Supp. 513.

In the original complaint (R. 1) the petitioner alleged that she was a resident of Melrose, Massachusetts, and that her intestate was also a resident of Melrose, Massachusetts, and that the respondent was a corporation organized under the laws of the State of Connecticut. It is also alleged that at the time of the accident the intestate was a passenger. There were two counts in the complaint, one

for death presumably under the Massachusetts Death Statute, although it is not so alleged, nor does the place of the alleged accident appear. The other count was for conscious suffering. The respondent filed a motion to dismiss (R. 3), in which it was admitted that the respondent is incorporated in Connecticut, but pleaded that diversity is lacking because the respondent is also a corporation organized under the laws of the Commonwealth of Massachusetts. This motion was denied (R. 3) for "reasons fully stated in *Gavin* v. *Hudson & Manhattan Ry. Co.*, 185 Fed. (2) 104."

On August 8, 1952, the defendant moved that the Court revoke its order on the previous motion to dismiss and enter an order dismissing the case for lack of jurisdiction (R. 4). In this motion the Court's attention was called to *Seavey* v. *B. & M. R.R.*, 197 F. (2d) 485, which was decided by the United States Court of Appeals for the First Circuit on June 20, 1952. Following a hearing, the Court allowed the foregoing motion to dismiss unless an amendment was filed supporting jurisdiction. On September 30, 1952, the petitioner filed an amended complaint, in which it was alleged that, in addition to diversity of citizenship, jurisdiction was based on the existence of a question under a Federal statute known as the Safety Appliance Act, Title 45 U.S.C. sec. 1 *et seq.* The amended complaint (R. 5) contained allegations as to citizenship identical to those in the original complaint, and further alleged that the petitioner's intestate sustained injuries while a passenger on the respondent's train, and died as a result of the alleged injuries. Several new counts were added, some of which might be construed as being based upon violation of the Safety Appliance Act. The respondent again filed a motion to dismiss on October 10, 1952 (R. 9), and after hearing thereon the judge of the District Court entered judgment for dismissal (R. 10). This judgment was affirmed by the

United States Court of Appeals for the First Circuit (R. 24).

Argument.

Point I.

DIVERSITY OF CITIZENSHIP IS LACKING BECAUSE THE PETITIONER AND THE RESPONDENT ARE BOTH CITIZENS OF MASSACHUSETTS.

The identical problem was succinctly stated in *Lake Shore & M.S. Ry. Co.* v. *Eder*, 174 Fed. 944, 945 (C.C.A. 6, 1909), as follows:

> "When the idea is grasped that whenever a corporation is sued in a state by whose laws it has been created and the question of its citizenship is involved the court will regard the corporation intended as defendant as the one created and existing by the laws of that state, we have the key to the solution of the inquiry."

The petitioner does not dispute the fact that the respondent is a domestic corporation incorporated by Massachusetts, Acts of 1872, c. 171, set forth in the appendix to this brief. It is her contention, however, that the fact that respondent is also incorporated in other states entitles the petitioner to ignore the domestic corporation and sue the respondent as a foreign corporation. Support for this position is found in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. (2d) 104 (C.A. 3, 1950). Respondent submits that such support is lacking elsewhere in identical circumstances.

The status of the respondent corporation in Massachusetts has been considered by the Supreme Judicial Court of that State, which definitely decided that it was a domestic corporation in Massachusetts.

Attorney General v. *New York, New Haven, & Hartford Railroad Co.*, 198 Mass. 413.

That case sets forth the history of this corporation and the provisions of the charters of incorporation in both Connecticut and Massachusetts. The respondent here was at that time seeking to avoid certain provisions of Massachusetts law applicable only to domestic corporations in Massachusetts.

At page 417 the Court said:

> "The first question to be considered is whether, by reason of the peculiarities of its organization as a corporation owning and operating a railroad extending into different States, and deriving power and authority from the legislation of different States, it is relieved from the prohibition of the statute. If, without considering other provisions of the charter from Massachusetts or of the charter from Connecticut, we look first at the facts that there was a consolidation of two corporations into a single corporation which was the creature of both States, operating a railroad extending into both, having the same capital stock to cover the property in both States, and electing its officers and managing its business as a single corporation, there is nothing that makes it any more a domestic corporation in one of the States than in the other. It is a foreign corporation in neither of them. It is a domestic corporation in each of them. It is a single corporation in most of its features. In other features it is two corporations acting together as one. It is a single corporation with two parents who live apart and act independently, each having absolute control in his own domain. It owes allegiance and is subject alike to each, and is dependent upon each alike for

> future favors. We are dealing now with a legislative consolidation, or merger, of two corporations, upon equal terms, which this was; and not with mere permission to a corporation of one State to enter another State and acquire property or franchises there."

And further, at pages 422-423:

> "Massachusetts cannot grant this corporation franchises to be enjoyed and exercised in Connecticut, which are contrary to the laws of Connecticut; for the corporation in each State is a domestic corporation, and as such it is governed by the laws of the State of its creation in all that it does within that State. We think it plain that, in the different provisions of the statutes of Massachusetts to which we have referred, the Legislature intended to retain control of the consolidated corporation as a domestic corporation in everything that it might do within this Commonwealth, and that, in recognizing its right to receive franchises and acquire property in Connecticut, it did not give it an implied right to receive any franchise in Connecticut to be enjoyed or exercised in Massachusetts in violation of the laws or public policy of this Commonwealth."

The language of the Massachusetts Court clearly shows that in the State of the forum in this case it has long been settled that the respondent is a domestic corporation. It is submitted that under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, the question of the status of a corporation organized under the laws of the State of the forum is a matter of local law.

It is not necessary, however, to rely on that doctrine, as an examination of the decisions of this Court indicate that

it has always looked to the law of the States to determine the citizenship of corporations organized in more than one State.

The question does not appear to have come before this Court in the identical form presented by the petition in this case. There have, however, been several cases where the Court has considered questions involving jurisdiction over corporations organized in more than one State. These cases indicate that, once it is clearly established that the corporation is in fact domestic in the State of the forum, jurisdiction is either absent or present in the Federal Courts depending on whether or not the opposing party is a citizen of the State of the forum.

As early as 1861, in *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286, this Court held jurisdiction to be absent in a suit in which a railroad incorporated both in Indiana and in Ohio was suing a citizen of Indiana in a United States Court.

Next, in *Chicago & Northwestern Railway Co.* v. *Whitton*, 13 Wall. 270 (1871), the Court held that a citizen of Illinois could sue in Wisconsin Federal Court a corporation organized both in Illinois and in Wisconsin. The Court pointed out that, strictly speaking, a corporation is not a citizen, but for the purpose of jurisdiction is treated as a citizen of the State which creates it, and that, where a corporation is created by laws of the State in which suit is brought, it is considered a citizen of that State, regardless of what its status or citizenship may be elsewhere.

This case and cases following it are the basis of petitioner's argument that there is an inconsistency between allowing a citizen of State A to sue a corporation organized under the laws of States A and B in State B, and not allowing the citizen of State A to sue in State A. Yet there is no inconsistency when it is realized that a corporation is domestic in each State where incorporated, and that the

citizenship in the forum both of the corporation and of the individual is what controls in each case. The Court in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. (2d) 104, also was critical of the supposed inconsistency. In that case, however, it appears that the dislike of the Court for the fiction of corporate citizenship leads the Court to disregard the fact of incorporation in the State of the forum and the attributes that this fact gives the corporation in each State where it is incorporated, that is, that it is a domestic corporation in each State.

Again, in *Muller* v. *Dows*, 94 U.S. 444 (1876), there was a suit by citizens of New York and of Missouri against two railroad corporations averred to be citizens of Iowa in a United States Court in Iowa. The corporation resisted jurisdiction on the ground of Missouri incorporation. The Court held that there was diversity between the Missouri citizen and the Iowa corporation. The suit in Iowa was to be considered only as against the Iowa corporation. The Court said:

> "The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone."

In *Memphis & Charleston Railroad Co.* v. *Alabama*, 107 U.S. 581 (1882), the State sued the railroad in a State Court. The railroad removed to the Federal Court, which remanded for lack of jurisdiction, since the railroad was also an Alabama corporation. This Court held that, there being no diversity, the case was properly remanded, and said:

> "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although also incorpo-

> rated in the State of Tennessee, must, *as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States.*" (Emphasis added.)

This case is identical in principle to the case at bar. The only difference in fact is that the railroad in Alabama was seeking jurisdiction in the Federal Court, while in Massachusetts a railroad is objecting to jurisdiction. If jurisdiction is lacking on removal, it is lacking when the plaintiff chooses the Federal Court in the first instance.

In *Patch* v. *Wabash Railroad Co.*, 207 U.S. 277 (1907), suit was brought in a State Court in Illinois by an administrator appointed by an Illinois Court. The railroad sought to remove to the Federal Court on the ground that it was an Ohio corporation. The plaintiff filed a plea alleging that the railroad was incorporated in Illinois as well as in other states. This Court held that the suit should be remanded to the State Court. The Court said (p. 283):

> "Therefore the question is raised how a corporation or corporations thus organized shall be regarded for the purposes of a suit like this. No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation, are needed for an answer. The defendant exists in Illinois by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same State, and is sued in that State. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere."

This decision appears to stand as the last one in which this Court has fully considered the question of multiple incorporation. (Cf. *Missouri Pacific Railway Co.* v. *Castle*,

224 U.S. 541 (1912), and *Baltimore & Ohio Railroad* v. *Parkersburg*, 268 U.S. 35 (1925), where the question came in only incidentally.) The language of the Court remains unimpaired and has been followed and applied by the lower Courts in denying jurisdiction in many cases where corporations incorporated in the State of plaintiff's residence have been sued in the Federal Courts.

The Courts of Appeals and the District Courts have consistently denied jurisdiction in cases similar to the case at bar until the Court of Appeals in the Third Circuit decided the *Gavin* case the other way. There are reported cases in the First, Second, Fourth, Seventh and Eighth Circuits.

Seavey v. *B. & M. R.R.*, 197 F. (2d) 485 (C.A. 1, 1952).

Geffroy v. *N.Y., N.H. & H. R.R. Co.*, 13 F. (2d) 947 (D.C. R.I. 1926); affd. 16 F. (2d) 1017 (C.C.A. 1, 1927).

Peterborough v. *B. & M. R.R.*, 239 Fed. 97 (C.C.A. 1, 1917).

Lucas v. *N.Y.C. R. Co.*, 88 F.S. 536 (D.C. N.Y. 1950).

Murphy v. *Hudson & Manhattan R. Co.*, 45 F.S. 720 (D.C. N.Y. 1942).

Town of Bethel v. *Atlantic Coast Line R. Co.*, 81 F. (2d) 485 (C.C.A. 4, 1936); cert. den. 298 U.S. 682.

Starke v. *N.Y. C. & St. L. R. Co.*, 180 F. (2d) 569 (C.A. 7, 1950).

Missouri Pacific R. Co. v. *Meeh*, 69 Fed. 753 (C.C.A. 8, 1895).

The petitioner contends that the cases hereinafter discussed support jurisdiction.

Ohio & Mississippi Railroad Co. v. *Wheeler*, 1 Black, 286 (1861):

This case has been referred to earlier in this brief as clearly indicating a lack of jurisdiction.

Nashua & Lowell Railroad Corp. v. *Boston & Lowell Railroad Corp.*, 136 U.S. 356 (1890):

The petitioner may well get some comfort from this case. The plaintiff railroad was organized both in New Hampshire and in Massachusetts and was suing a Massachusetts corporation. A divided Court held that there were two separate corporations and that the New Hampshire corporation could sue as a foreign corporation in Massachusetts even though there was another corporation in Massachusetts with the same name and stockholders. This decision seems to rest upon the principle that the two corporations were entirely separate, each a distinct entity in its own State, and that the New Hampshire corporation could sue in Massachusetts as a separate and distinct entity from the Massachusetts corporation. This case seems to stand by itself and can perhaps be explained by the unusual corporate structure discussed at length by the Court. In any event, it hardly seems to follow that the case is authority for the proposition that a citizen of Massachusetts can sustain jurisdiction in the Federal Court in Massachusetts for a wrong alleged to have been committed by the domestic corporation in Massachusetts, merely by alleging that she is suing the corporation as an entity of another State.

St. Louis & San Francisco Railway Co. v. *James*, 161 U.S. 545 (1896):

Here a Missouri citizen was suing a Missouri corporation in the Federal Court in Arkansas. Defendant denied

that it was an Arkansas corporation as alleged. The Court held that diversity was lacking, since the Arkansas statute did not create a separate corporation, but merely permitted the Missouri corporation to do business under the laws of Arkansas. The case may be distinguished in that there was no true corporate existence in the State of the forum. (Cf. *Patch* v. *Wabash Railroad Co.*, 207 U.S. 277, 284 (*supra*), where the Court distinguishes this case and others of the same nature.)

Southern Railway Co. v. *Allison*, 190 U.S. 326 (1903):

This was a removal from the State Court in North Carolina to the Federal Court on the ground that the railroad was a Virginia corporation. The removal was sustained on authority of *St. Louis & San Francisco Railway Co.* v. *James* (*supra*), since the South Carolina statute merely permitted the railroad to do business in South Carolina.

Louisville, New Albany & Chicago Railway Co. v. *Louisville Trust Co.*, 174 U.S. 552 (1899):

This suit was brought in Kentucky by a corporation alleged to be an Indiana corporation against a Kentucky corporation. The jurisdiction was challenged on the ground that the railroad was also a Kentucky corporation. The Court upheld jurisdiction, holding that the Kentucky statute was merely an enabling statute authorizing a corporation of another State to do business.

The effect of the argument which the petitioner here advances would be to give the Federal Courts jurisdiction based on diversity in all actions by or against corporations organized in more than one State, subject only to the limitation of the statutory amount of $3000.

This the respondent submits is unsound in principle and contrary to the decisions of this Court.

Point II.

This is Not an Action Arising "under the Constitution, Laws or Treaties of the United States" (28 U.S.C. sec. 1331).

The petitioner in her amended complaint alleges a violation of the Safety Appliance Act (45 U.S.C. sec. 1 *et seq.*) and contends that this gives the United States District Court jurisdiction in this action.

The various counts in the amended complaint, however, set forth causes of action under the Massachusetts Death Statute (Mass. G.L. (Ter. Ed.) c. 229, as amended) with additional counts at common law for conscious suffering. There are allegations in some of the counts which might be construed as violation of the Safety Appliance Act as the basis of negligence.

This Court has held in several cases that the Safety Appliance Act does not create any independent right of action, and does not by its terms give jurisdiction to the Federal Courts.

That Act is a penal statute wherein certain requirements as to equipment of rail carriers are prescribed and penalties provided for failure to maintain the standards prescribed. It is intended primarily but not exclusively for the protection of employees. Even for employees, no separate cause of action is provided by any of its terms.

The effect of the Act was considered in *Gilvary* v. *Cuyahoga Valley Railway Co.*, 292 U.S. 57, 61, where the Court said:

> "A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in

interstate or in intrastate commerce. And by abolishing assumption of risk the Acts impliedly recognize the right to recover for injuries resulting therefrom. But the absence of a declaration similar to that in the Federal Employers Liability Act, which denounces contracts and other arrangements made for the purpose of exempting carriers from liability created by that Act (45 U.S.C., § 55), strongly suggests a lack of legislative purpose to create any cause of action therefor. Moreover, if there had been such purpose, Congress probably would have included provisions in respect of venue, jurisdiction of courts, limitations, measure of damages, and beneficiaries in case of death."

And further (from the same opinion):

". . . while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach 'sprang from the principle of the common law' and was left to be enforced accordingly, or in case of death 'according to the applicable statute.'"

The nature of the Act was again considered in the recent case of *Urie* v. *Thompson*, 337 U.S. 163, 188, where the Court said:

"But by its own terms the Boiler Inspection Act, like the Safety Appliance Acts, does not purport to confer any right of action upon injured employees. It merely makes violation of its prohibitions 'unlawful.'"

And further (in the same opinion at p. 189):

". . . the Boiler Inspection and Safety Appliance Acts cannot be regarded as statutes wholly separate

from and independent of the Federal Employers' Liability Act. They are rather supplemental to it, having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible."

In *Moore* v. *Chesapeake & Ohio Railway Co.*, 291 U.S. 205, 214; 78 L. Ed. 755, 761, one of the jurisdictional questions considered was whether the Safety Appliance Act itself provided any right of action to an employee. The Court held that it did not do so, but that the right of action was based upon the law of Kentucky, even though a breach of duty might be shown under the Federal Safety Appliance Act. The Court held that jurisdiction in such cases must be based on diversity alone, which was present in that case. At page 214 the Court said:

". . . it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the federal court in the absence of diversity of citizenship. The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights."

Speaking of the situation in the absence of the Federal Employers' Liability Act, the Court says (at pages 215-216):

"The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach

of duty sprang from the principle of the common law (*Texas & Pacific R. Co.* v. *Rigsby, supra,* [241 U.S.] 39, 40) and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute."

Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. *Popplar,* 237 U.S. 369.

The respondent submits that, even though the violation of the Safety Appliance Act might be used as evidence of negligence in a death action brought under the State law, there would be no jurisdiction in the Federal District Court.

This Court has held that to establish jurisdiction in a Federal Court a United States statute must be the source of the right and not merely incidental to it.

Fairport, Painesville & Eastern Railroad Co. v. *Meredith,* 292 U.S. 589, 597 (1934).

Gully v. *First National Bank in Meriden,* 299 U.S. 109.

Puerto Rico v. *Russell & Co.,* 288 U.S. 476.

In *Fairport, Painesville & Eastern Railroad Co.* v. *Meredith,* 292 U.S. 589 (1934), the case had been tried in a State Court, and the question on certiorari was whether a traveler on a highway could claim the benefit of the Federal Safety Appliance Act. The Court held that, while the plaintiff was entitled to the benefit of the Act as establishing a duty, the right to enforce the liability arising from violation of the duty was derived from the common law.

In *Puerto Rico* v. *Russell & Co.,* 288 U.S. 476 (1933), the Court, speaking of a different statute, stated the rule as to jurisdiction as follows (p. 483):

"Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute.

> It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive—not the source of the authority to establish it."

The comment of this Court in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 673, seems to answer petitioner's comment as to congressional intent:

> "With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations. See *Gully* v. *First National Bank*, [299 U.S. 109] at 113."

The respondent respectfully submits that the petitioner has failed to establish any ground for jurisdiction based upon an action arising under the Constitution, laws or treaties of the United States.

Conclusion.

The respondent respectfully urges that the petition be denied.

Respectfully submitted,

PAUL F. PERKINS,

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Appendix.

COMMONWEALTH OF MASSACHUSETTS.
ACTS OF 1872, CHAPTER 171.

AN ACT to authorize the Hartford and New Haven Railroad Company to consolidate with the New York and New Haven Railroad Company.

SECTION 1. The Hartford and New Haven Railroad Company may sell, transfer, merge and consolidate its corporate rights, powers and estate to, into and with the New York and New Haven Railroad Company, upon such considerations, terms, stipulations and conditions as may be agreed upon between said corporations and as are authorized by the provisions of this act.

SECTION 2. The directors of said corporation may enter into proper agreements for the sale, transfer, purchase and merger hereby authorized, prescribing the terms and conditions thereof, the mode of effecting such transfer, merger and consolidation, and the number of directors thereof, one or more of whom shall be citizens of this Commonwealth, the amount of the capital stock of such consolidated corporation, which shall not exceed the present capital of said companies, the manner of converting the capital stock of said original corporations into the capital stock of said consolidated corporation, and such other matters and things as may be necessary or proper to effect the purposes and merger aforesaid: *provided, however,* that such agreement of the directors herein before authorized shall be submitted to the stockholders of each of said corporations separately, at meetings specially called for that purpose, and, if approved by a vote of at least two-thirds of the stock represented at each of said meetings, said agreement so to be made by said directors shall become the agreement of said corporations respectively, and a certified copy thereof, together with a certificate of the adoption

thereof by the stockholders of said respective corporations, under the hand of the secretary of each of said corporations, shall be filed in the office of the secretary of this Commonwealth.

SECTION 3. Upon the filing of such certificate said companies shall become and be merged and consolidated into one corporation, under the name of the New York, New Haven and Hartford Railroad Company, and shall become and be a body politic and corporate, and shall possess, hold and enjoy all the rights, powers, franchises and privileges, theretofore vested in either of said corporations, and all property, real and personal, of said companies, shall be deemed to be vested in said consolidated corporation.

SECTION 4. All rights of creditors and all liens upon the property of either of said corporations shall continue unimpaired, and all debts, contracts and liabilities of either of said corporations shall continue unimpaired, and shall attach to and become binding upon such consolidated company, and may be enforced in the same manner and to the same extent as if incurred by said latter corporation, and in the courts of Massachusetts in all cases in which the claimants shall so elect.

SECTION 5. Said consolidated corporation shall be subject to the charter of the corporation into which such merger is made: *provided, however,* that when a special duty or liability is imposed, or any special franchise, privilege or immunity is conferred on the corporation so merged by its charter, such duty or liability shall attach to and be discharged by, and such franchise, immunity or privilege be enjoyed by such consolidated corporation, so far as the same is applicable to the road and franchise of said merged corporation.

SECTION 6. Said consolidated corporation shall ticket passengers, check baggage, way-bill freight, transfer cars and give full and equal facilities for the convenient trans-

fer of passengers, baggage and freight, to and from all connecting railroads, and shall make no unequal discrimination for or against either of such railroads, or any railroad that may at any time meet or connect with the said consolidated railroad.

SECTION 7. Said consolidated corporation shall at all times be subject to the legislature of this state as to that portion of its road in this state, as heretofore; and shall be subject to the general laws of this state as to its whole road so far as such laws may be applicable thereto.

SECTION 8. The provisions of the eleventh section of the charter of the New York and New Haven Railroad Company shall remain in force and apply to that portion of the road of the consolidated company which is now the New York and New Haven Railroad, and, for the purposes contemplated in that section, the portion of the consolidated road which is now the Hartford and New Haven Railroad, shall forever be considered a connecting road.

SECTION 9. This act and any act regarding the said consolidated corporation shall be subject to alteration, modification or repeal by the legislature.

SECTION 10. This act shall take effect upon its passage.

JAN 18 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 404

ALICE D. JACOBSON, ADMINISTRATRIX,
Petitioner

v.

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 16) is reported at 206 Fed. 2nd 153 and the opinion of the District Court (R. 10) is reported at 109 Fed. Supp. 513.

JURISDICTION

The jurisdiction of this Court rests upon the Constitution of the United States, Article III, Sec. 2---actions between citizens of different states.

STATUTES INVOLVED

Commonwealth of Massachusetts, Acts of 1872 Chapter 171, and Public Acts of Connecticut, Vol. 1866-1871, Page 713, chapter CXXIX, Acts of 1871, the pertinent portions of which are set out in the Argument.

QUESTION PRESENTED

The decree below was entered July 14, 1953. On October 9, 1953, the petitioner filed a petition for certiorari, to review the decision of the Court of Appeals. This petition for certiorari was granted on November 30, 1953, limited to Question No. 1 presented by the petition for the writ which reads as follows:

> "Was there diversity of citizenship even though the defendant (a multiple corporation) was also incorporated in Massachusetts, which would confer jurisdiction upon the United States District Court for the District of Massachusetts?"

STATEMENT

The Petitioner, as Administratrix, by her complaint (R. 1) filed March 18, 1952, and thereafter amended (R. 5), seeks to recover for the death and conscious suffering of Margaret B. Price, whom, it was alleged, was injured and died from injuries sustained as a result of the negligence of the Defendant. At the time of the accident the deceased was a passenger on a train operated by the Defendant en route from Lake Worth, Florida to Boston, Massachusetts (R. 2). Jurisdiction of the Court is based upon diversity of citizenship, it being alleged that the Defendant corporation was of Connecticut and the Plaintiff of Massachusetts.

The Defendant moved to dismiss the bill (R. 3) for the reason that the Defendant is also incorporated in Massa-

chusetts. This motion was denied (R. 3). On August 8, 1952, the Defendant filed a motion (R. 4) for the Court to revoke its order on the Defendant's motion to dismiss which motion was allowed, unless an amendment to the complaint was filed supporting jurisdiction. Plaintiff filed an amended complaint (R. 5) on September 30, 1952 to which the Defendant filed a motion to dismiss (R. 9). On January 19, 1953 Judgment for dismissal (R. 10) was entered. From this judgment the Plaintiff appealed to the First Circuit Court of Appeals and in the opinion of the Court (R. 16) the judgment of the District Court (R. 10) was affirmed. Thereafter this Court granted certiorari.

Article III of the Constitution of the United States, Section 2 defines the jurisdiction of the Federal Courts and insofar as the purposes of this case are concerned, the applicable portion thereof is as follows:-

ARGUMENT.

> "The judicial power shall extend to all cases by the citizens of different states."

At the time of the adoption of the Constitution, the framers thereof, when referring to citizens, did not include corporations because at that time there were very few corporations and those which existed were for the most part toll bridges, waterways, etc.

In order to create jurisdiction in the Federal Courts, the Supreme Court created the fiction of citizenship. The fiction of citizenship has taken on two concepts. The first concept appeared from about 1809 to about 1844 and is set forth in the decision of *Bank of the United States* v. *Devereaux*, 5 Cranch 61. In that case, the United States Supreme Court, speaking through Chief Justice Marshall, made it clear that a corporation, as such, is not a citizen, and further said that the pre-requisite of diversity of

citizenship exists when, and only when, there is a complete diversity of state citizenship between the shareholders of a corporate party and opposing party. The Court further resolved to consider the character of the individuals who composed the corporation even when they used the name of the corporation for the privilege of asserting their corporate rights. The privilege of citizens of a state different from that of the defendant to sue in the Federal Court is not lost by their incorporation. 5 Cranch 61 at 86-91 (*Supra*). The Court went on to sustain the averment of the citizenship of the stockholders as being of Pennsylvania whereas the defendants were of Georgia and thus *created* jurisdiction in the Federal Court by reason of the diversity of citizenship.

In 1844, however, the Supreme Court enunciated a new doctrine in the case of *Louisville, Cincinnati & Charleston R.R.* v. *Letson*, 2 Howard 497. Mr. Justice Wayne speaking for the Court as follows said:

> "A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the State, seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore, entitled, for the purpose of suing and being sued, to be deemed a citizen of that State".

Corporations thus became citizens by "judicial baptism" said Mr. Justice Daniel. *Marshall* v. *Baltimore & Ohio R.R.*, 16 Howard 314 at 344.

Thereafter the Supreme Court stated that a corporation cannot be a citizen. However, a suit by or against a corporation may be regarded as a suit by or against its shareholders, and if their citizenship is appropriate, jurisdiction exists. To make their citizenship appropri-

ate, the Court cut off all inquiry in this respect and stated that the shareholders of every state corporation shall be deemed citizens of the state which incorporat[illegible] it. *Marshall* v. *Baltimore & Ohio R.R.*, 16 Howard 314 at 329.

In a prior decision, *Ohio & Mississippi R.R.* against *Wheeler* 1 Black 286 at 296, however, Chief Justice Taney rephrased the language of the Letson case and said:

> "Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state and that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible."

This latter case was a suit by an Ohio and Indiana corporation against a citizen of Indiana in the United States Circuit Court for Indiana and it was held that the United States Circuit Court had no jurisdiction. This doctrine seems to have been followed in the case of *Chicago & Northwestern* v. *Whitten*, 13 Wall 220 and in the *Southern R.R. Co.* v. *Allison*, 190 U.S. 326, Sup. Ct. Rep. 713; BUT there was a change in the doctrine in the case of *Patch* v. *Wabash*, 207 U.S. 277, 28 Sup. Ct. Rep. at 80. That was a suit brought in the state court of Illinois by an administrator against a defendant railroad incorporated both in Illinois and in Ohio. The railroad attempted to remove the case to the Federal District Court. The United States Supreme Court, speaking through Justice Holmes, said as follows:

> "A corporation organized and existing under and by virtue of the laws of several states including the

one in which suit against it is brought, must be regarded as a citizen of the latter state for the purpose of determining its right to remove the cause to the Federal Circuit Court, especially where the Constitution and the laws of that state (Illinois) require that a majority of the directors shall be residents and the corporation shall keep a general office in that state".

It is to be noted that in the instant case there is no requirement that the shareholders in the New York, New Haven and Hartford R.R. Co. be citizens of Massachusetts or, in fact, citizens of any one particular state. It is upon this ground we feel that the two cases are distinguishable. Because of this doctrine, two unique situations result.

1. In the case of *Lakeshore and M.S. Railway* v. *Eder*, 174 Federal 944 CCA (6th) 1909, a corporation alleging itself to be an Ohio corporation sues a citizen in the Federal Court of Indiana although it is actually also incorporated in Ohio, the Federal Court may take jurisdiction. The necessary diversity of citizenship is supplied by the fiction that all the shareholders are citizens of Ohio.

2. If the same corporation alleges itself to be an Indiana corporation and sues a citizen of Ohio in the Federal Court of Ohio, diversity of citizenship is supplied by the fiction that all the shareholders are citizens of Indiana, thus giving to this artificial being citizenship in two states. It therefore can be seen that from this paradoxical situation it is possible for a corporation to impose citizenship upon the Court whenever it decides to have a case in which it becomes involved to be heard in the Federal District Courts.

To say that a corporation does not exist beyond the boundaries of the state creating it is an absurdity. It does exist through its officers and agents and it does act through them. When a train of the defendant corporation passes the boundaries of Connecticut into Massachusetts, does the ownership of the train change to that of the Massachusetts corporation? Does it cease at that point to be a Connecticut corporation? When and at what point does this transition take place?

The defendant corporation is but one railroad. It has the same officers and the same shareholders. To quote the language of the Gavin Case, *Gavin* v. *Hudson & Manhattan R.R. Co.* 185 Federal (2) 104 (CA 3d 1950):

> "There is but one railroad no matter how many certificates of incorporation hang on its walls."

How then can a judicial fiction constitute this railroad a citizen of many states. It is the law of the land that a Plaintiff, a citizen of Massachusetts can bring suit against a multi-incorporated railroad which is also incorporated in New Hampshire, in the United States District Court for the District of New Hampshire. *Boston and Maine R.R.* v. *Breslin,* 80 F 2d 949 Certiorari denied 297 U.S. 715, 56 Sp. Ct. Rpr. 590, 80 L Ed 1000. *Boston and Maine R.R.* v. *Hurd,* 100 F 116 Certiorari denied, 184 U.S. 700, 22 Sp. Ct. 939.

This makes the matter of Federal jurisdiction in these causes a matter of carfare. In other words one without funds to travel to another state runs the risk of losing what rights he may be entitled to. As was stated in the Gavin case.

"Such a rule if adopted may be an effective means of promoting additional passenger business, but it would be pretty hard to explain its reason to the layman".

We cannot agree with the theory laid down in *Seavey* v. *The Boston and Maine R.R.* 197 Fed 2nd 485 which said that the layman's view is not pertinent.

We submit that if a legal rule fails to satisfy the untechnical requirements of ordinary common sense, the premises behind the rule should be re-examined. This judicial fiction was created only so that jurisdiction on the ground of diverse citizenship could be obtained. This presumption of citizenship should be confined to the state of original incorporation. In that manner only we will have a clear rule which even the layman will understand. It would seem to us that the better rule to be adopted is that contained in the restatement of the law. Let us adopt the rule suggested in the Restatement of the Law 203-207 as follows:

"Suit may be brought by and against multiple corporations in any of the incorporating states."

CONCLUSION

For the reasons stated, it is submitted that the United State District Court for the District of Massachusetts did have jurisdiction of the amended bill of complaint.

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JAN 27 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1953

No. 404

ALICE D. JACOBSON, Administratrix,

Petitioner,

—against—

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF

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Supreme Court of the United States.

OCTOBER TERM, 1953

No. 404

ALICE D. JACOBSON, Administratrix,

Petitioner,

—against—

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF

Opinions of the Courts Below

The opinion of Judge Ford of the United States District Court for the District of Massachusetts (R. 10-12) is reported in 109 F. Supp. 513.

The opinion of the United States Court of Appeals for the First Circuit by Chief Judge Magruder (R. 16-24) is reported in 206 F. 2d 153.

Jurisdiction

The judgment of the Court of Appeals was rendered and filed on July 14, 1953 (R. 24). Petition for writ of certiorari was filed on October 9, 1953. Certiorari was granted on November 30, 1953 (R. 25).

This Court has jurisdiction under 28 U. S. C. §1254 (1).

Question Presented

Review herein was granted, limited to question No. 1 of the petition, which reads as follows:

> "Was there diversity of citizenship even though the defendant (a multiple corporation) was also incorporated in Massachusetts, which would confer jurisdiction upon the United States District Court for the District of Massachusetts?" (R. 25).

The question could be reframed as follows:

> "Did the United States District Court for the District of Massachusetts correctly dismiss the complaint for lack of diversity of citizenship, the plaintiff being a citizen of Massachusetts, the defendant being a consolidated corporation incorporated voluntarily and at the same time under the laws of Massachusetts and under the laws of Connecticut, and the complaint alleging a tort occurring in Massachusetts and governed by the substantive law of Massachusetts?"

Constitution and Statutes Involved

The judicial power extends to all cases "between Citizens of different States". Constitution, Art. 3, §2, cl. 1. The district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between "Citizens of dif-

ferent States". 28 U. S. C. §1332 (a) (1). The Massachusetts and Connecticut charters of the New York, New Haven and Hartford Railroad Company are set out in the Appendix.

Statement of the Case

The complaint alleges (R. 1-2) that plaintiff, the administratrix of the estate of Margaret B. Price, and deceased were of Melrose, Massachusetts, and that the defendant was a Connecticut corporation; that on May 2, 1950 plaintiff's deceased sustained fatal injuries while a passenger of defendant, due to its negligence; that an action has accrued for conscious pain and suffering, and another action for the use of next of kin. The accident took place in Boston (R. 17).

The defendant moved to dismiss the action on the ground that it was a domestic corporation duly organized under the laws of the Commonwealth of Massachusetts, as well as under the laws of Connecticut, and that therefore there was no diversity of citizenship (R. 3). The motion was denied for reasons stated in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. 2d 104 (3d Cir. 1950), and later defendant's motion for rehearing and to dismiss was allowed, unless an amendment was filed supporting jurisdiction (R. 3-4).

The plaintiff filed an amended complaint (R. 5-9) reasserting the original cause of action and alleging also violation of a federal statute. Defendant moved to dismiss the amended complaint (R. 9). The district court granted the motion (R. 10).

The United States Court of Appeals found no diversity of citizenship, refused to overrule its own controlling decision in *Seavey* v. *Boston & Maine R. R.*, 197 F. 2d 485 (1st Cir. 1952), and found that the new cause of action based on the federal statute was not within the jurisdiction of the court (R. 16-24). It treated the case as a suit by a citizen of Massachussetts against "a corporation incorporated under the laws of Massachusetts on an alleged tort occurring in Massachusetts and governed in its substantive aspects by the local law of Massachusetts" (R. 17). It affirmed the order of the district court (R. 24).

Summary of Argument

The New York, New Haven and Hartford Railroad Company came into being by acts of Connecticut in 1871 and of Massachusetts in 1872. Since 1872 it has been a domestic corporation in Massachusetts. The incorporation in Massachusetts was free and substantially simultaneous with that in Connecticut.

In the case of multi-state corporations the entity must be regarded as solely incorporated in each state. For purposes of diversity jurisdiction the defendant must be treated as a citizen of Massachusetts, when sued in Massachusetts.

ARGUMENT

I

The decisions in *Seavey* v. *Boston & Maine R. R.*, 197 F. 2d 485 (1st Cir. 1952) and in the present case are to be preferred over the decision in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. 2d 104 (3rd Cir. 1950).

It may be useful at the outset to point out the conflict between the First and Third Circuits. In *Seavey* v. *Boston & Maine R. R.*, 197 F. 2d 485 (1st Cir. 1952) a citizen of Massachusetts sued a New York and Massachusetts corporation but described it as a New York corporation. It was held that the federal court in Massachusetts did not have jurisdiction.

Judge Woodbury's opinion rejects the decision in the *Gavin* case and argues: (1) By firmly established legal fiction a corporation is treated as a citizen, and a multi-state corporation is regarded in each state as solely domesticated therein. (2) These basic fictions upon which the concept of corporation citizenship rests are practical and lead to a logical conclusion. (3) It is a rule that under diversity jurisdiction a citizen of another state may sue a multi-state corporation in the federal court of a state where it is incorporated even though it is also incorporated in the state of plaintiff's citizenship. The Supreme Court has stressed the fact that a multi-state corporation is a separate legal entity in each state of its incorporation. (4) The rule has been followed that

a suit may not be brought against a multi-state corporation in the federal court of a state of incorporation by a citizen of that state. This is based on the legal fiction of corporate citizenship of the state of incorporation and the further fiction that the entity is regarded as solely incorporated therein. (5) Following this well established rule will reduce the number of cases in the federal courts, and furnish a clear guide for practitioners.

Chief Judge Magruder, writing the opinion for the Court of Appeals in the case at bar, adhered to the decision in the *Seavey* case.

In *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. 2d 104 (3rd Cir. 1950), a citizen of New Jersey sued in the federal court for New Jersey a New York and New Jersey corporation but described it as a New York corporation. It was held that the federal court had jurisdiction.

Judge Goodrich's opinion argues: (1) A corporation is not a citizen of any state. (2) The rule in the multiple incorporation situation is not clear and practical. (3) There is no Supreme Court decision directly on the subject. (4) Suit by or against a multiple-state corporation may be brought by or against it as a corporation of any of the states in which incorporated. (5) This rule does not require useless ritual in the institution of a suit, and establishes a clear guide.

It is submitted that this view recognizes a corporation as a citizen but gives to multi-state corporations greater opportunities to get into federal courts than to other forms of business associations and to ordinary

citizens. The decision would permit multi-state corporations always to sue in the federal courts and always to remove from a state court, regardless of considerations of local prejudice. It extends diversity jurisdiction when the federal calendars are already overcrowded. It hampers development of local law by state courts, and needlessly requires federal courts to decide matters of local concern. It ignores the policy of strict construction of the Judiciary Act. See *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288 (1938); *Shamrock Oil Co.* v. *Sheets*, 313 U. S. 100, 108 (1941); *Indianapolis* v. *Chase Nat. Bank*, 314 U. S. 63, 76-77 (1941); and *Thomson* v. *Gaskill*, 315 U. S. 442, 446 (1942).

The decision in the *Gavin* case has been adversely criticized in 64 Harv. L. Rev. 1009 (1951); 4 Univ. of Fla. L. Rev. 410 (1951); 9 Wash. & Lee L. Rev. 96 (1952); 20 Fordham L. Rev. 203 (1951); 14 Ga. B. J. 374 (1951); 3 Ala. L. Rev. 397 (1951); 14 Ohio L. J. 106 (1953); and 7 Rutgers L. J. 418 (1953).

It may be noted that plaintiff advances a third rule—a presumption of citizenship confined to the state of original incorporation (petitioner's brief, p. 8). This rule is particularly inappropriate in cases like the one at bar where incorporation in two states was voluntary and substantially simultaneous. It lacks substantial judicial authority, and advances an irrelevant criterion.

II

The defendant should be treated as a citizen of Massachusetts for the purpose of federal diversity jurisdiction.

The Hartford and New Haven Railroad Company was incorporated in Connecticut in 1833. Private Laws of Conn., Vol. I, p. 1002. The Hartford and Springfield Railroad Company was incorporated in Connecticut in 1835 (Private Laws of Conn., Vol. I, p. 1006), and in Massachusetts in 1839 (Mass. Acts and Resolves, 1839, ch. 101), and their consolidation was provided for in 1840 (Private Laws of Conn., Vol. IV, p. 917). In 1847 Massachusetts provided for the union of the Hartford and Springfield with the Hartford and New Haven Railroad Company (as already provided for in 1844 by Massachusetts and Connecticut, Private Laws of Conn., Vol. IV, pp. 901, 967; Mass. Acts and Resolves, 1844, ch. 28, and 1845, ch. 42) under the name of the Hartford and New Haven Railroad Company and subject to the laws of Massachusetts. Acts of 1847, ch. 244.

The New York and New Haven Railroad Company was incorporated in Connecticut in 1844. Private Laws of Conn., Vol. IV, p. 1020.

In 1871 the Hartford and New Haven Railroad Company was consolidated with the New York and New Haven Railroad Company under the name of the New York, New Haven and Hartford Railroad Company. Conn. Public Acts, 1871, ch. 129 (see Appendix, pp. 19 to 23).

In 1872 Massachusetts, by Acts of 1872, ch. 171, authorized the Hartford and New Haven Railroad

Company to consolidate with the New York and New Haven Railroad Company, under the name of New York, New Haven and Hartford Railroad Company (see Appendix, pp. 24 to 26).

On August 6, 1872 an agreement was entered into by the two new railroad companies and filed in Massachusetts on the same day, which agreement conformed to the provisions of the charters.

The opinion in *Attorney General* v. *New York, N. H. & H. R. R.*, 198 Mass. 413 (1908) says of the defendant there (p. 417):

> ". . . there is nothing that makes it any more a domestic corporation in one of the States than in the other. It is a foreign corporation in neither of them. It is a domestic corporation in each of them. . . . We are dealing now with a legislative consolidation, or merger, of two corporations, upon equal terms, which this was; and not mere permission to a corporation of one State to enter another State and acquire property or franchises there."

See also Opinion of Attorney-General of Massachusetts, Public Documents 1895, No. 12, p. 43; Official Opinions of The Attorneys-General of the Commonwealth of Massachusetts, Vol. I, 1891-1898, pp. 118-140. This opinion reads in part as follows (p. 136):

> "The charter by Massachusetts of the New York, New Haven & Hartford Railroad Company (St. 1872, c. 171), must be regarded as concurrent legislation with the charter of Connecticut. The Massachusetts act does not, indeed, refer in terms

> to the Connecticut act. But it purports to create a new corporation which should succeed to the rights of two existing corporations, one chartered solely by Connecticut and the other by the two States expressly concurring, and which new corporation should operate and maintain a railroad line in both States. This, obviously, could not be done except by concurrence of Connecticut; and such concurrence must have been in contemplation by the Legislature of Massachusetts when it gave a charter professing to deal with a Connecticut corporation. Moreover, the Massachusetts charter was granted the next year after the Connecticut charter, and was so identical in its terms and provisions that it is inconceivable that the similarity could have been accidental. The agreement for merger filed in the office of the Secretary of the Commonwealth, which was a necessary antecedent to the taking effect of the charter, recited that it was executed in pursuance of authority granted by the legislatures of both States."

The Hartford & Springfield Railroad Corporation was created from natural persons by Massachusetts, succeeded by the Hartford & New Haven Railroad Company, in turn succeeded by the New York, New Haven & Hartford Railroad Company. The last was held to be "a corporation created by the legislature of Massachusetts from natural persons" and, for all purposes of federal jurisdiction, a citizen of Massachusetts. *Smith* v. *New York, N. H. & H. R. Co.*, 96 Fed. 504, 511 (C. C. D. Mass. 1899). See also *Goodwin* v. *New York, N. H. & H. R. Co.*, 124 Fed. 358 (C. C. D. Mass. 1903); *Geoffroy* v. *New York, N. H. & H. R.*

Co., 13 F. 2d 947 (D. C. R. I. 1926), affd. 16 F. 2d 1017 (1st Cir. 1927).

In *Wadell* v. *Green Textile Associates*, 92 F. Supp. 738 (D. C. Mass. 1950), the court took judicial notice that the New York, New Haven & Hartford Railroad Company was a Massachusetts corporation chartered by a special act of the legislature, St. 1872, c. 171.

The consolidation was voluntarily made by the constituent corporations, with the assent of the stockholders, pursuant to legislation in two states designed to take effect concurrently. *Mackay* v. *New York, N. H. & H. R. Co.*, 82 Conn. 73 (1909).

"What constitutes sufficient legislation to make a state corporation is ostensibly a matter of state law." Note, 44 Harv. L. Rev. 1106, 1107 (1931). See *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). The judgment of the state courts should be accepted unless a contrary view is demanded for constitutional or federal statutory reasons. *Thomas* v. *Board of Trustees*, 195 U. S. 207 (1904). The real test is the intention of the legislature, *Louisville, New Albany & Chicago Ry.* v. *Louisville Trust Co.*, 174 U. S. 552 (1899), subject to limitation of the state's power directly to affect access to the federal courts, *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922), or indirectly to do this by involuntary or compulsory incorporation, *Missouri Pac. Ry. Co.* v. *Castle*, 224 U. S. 541 (1912); *Southern Ry.* v. *Allison*, 190 U. S. 326 (1903); *St. Louis & San Francisco Ry.* v. *James*, 161 U. S. 545 (1896). Of course, a mere permission to do business does not amount to incorporation. *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.*, 118 U. S. 290 (1886); *Martin's Administrator* v. *Balti-*

more & Ohio R. R. Co., 151 U. S. 673 (1894); *Louisville, New Albany & Chicago Ry.* v. *Louisville Trust Co., supra*, 174 U. S. 552 (1899). Under any criterion the defendant in the case at bar would be held to be a Massachusetts corporation, and also a Connecticut corporation.

Judge Goodrich expressed the view in *Gavin* v. *Manhattan R. Co., supra*, 185 F. 2d 104, 107, that the Supreme Court authorities do not help very much. An analysis of its decisions from 1809 to 1912 clearly demonstrates that a citizen of a state cannot sue in a federal court of that state a corporation incorporated in the same state, even though also incorporated elsewhere.

In *Bank of the United States* v. *Deveaux*, 5 Cranch. 61 (U. S. 1809), the stockholders of the corporate party were citizens of a state diverse from that of the adverse parties. The Court considered the citizenship of the individuals who composed the corporation as controlling and held that the federal court had jurisdiction. In *Louisville, Cincinnati & Charleston R. R.* v. *Letson*, 2 How. 497 (U. S. 1844), it was held that the corporation itself should be deemed a citizen of the state which created it. In *Marshall* v. *Baltimore & Ohio R. R.*, 16 How. 314 (U. S. 1854), it was held that there was a conclusive presumption that all the shareholders of a corporation were citizens of the state which created it. In *Ohio & Miss. R. R.* v. *Wheeler*, 1 Black 286 (U. S. 1862), suit was brought in the federal court for the district of Indiana by a corporation created by the laws of Indiana and Ohio against a citizen of Indiana. The Circuit Court had no jurisdiction. The corporate entities were treated as separate and distinct. To the same effect for the

same reasons is *Muller* v. *Dows,* 94 U. S. 444 (1876), where the federal court in Iowa was held to have jurisdiction of a suit by a Missouri plaintiff against a corporation of Iowa and Missouri.

The federal court in Wisconsin had jurisdiction of a suit by an Illinois citizen against an Illinois and Wisconsin corporation. *Chicago & N. W. Railway Co.* v. *Whitton,* 13 Wall. 270 (U. S. 1872). The State of Alabama sued, in an Alabama state court, a corporation organized under the laws of Alabama and Tennessee. The suit was removed to the United States court, then remanded to the state court. *Memphis & Charleston R. R. Co.* v. *Alabama,* 107 U. S. 581 (1882). The opinion says (p. 585):

> "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

Nashua & Lowell R. R. v. *Boston & Lowell R. R.,* 136 U. S. 356 (1890), may be inconsistent with other decisions of this Court. The case held that the federal court in Massachusetts had jurisdiction of a suit brought by a New Hampshire and Massachusetts corporation against a Massachusetts corporation.

In *Patch* v. *Wabash R. R.,* 207 U. S. 277 (1907), suit was brought in an Illinois state court. Defendant filed a petition for removal to a United States court.

Plaintiff was a citizen of Illinois, as was defendant by consolidation. It was held that the defendant existed in Illinois and could not escape state jurisdiction by the fact that it was also incorporated in Ohio. It was assumed that the incorporations were substantially simultaneous and free.

The opinion by Mr. Justice Holmes says (pp. 283-284):

> "The defendant exists in Illinois by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same State, and is sued in that State. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere . . . In the case at bar the incorporations must be taken to have been substantially simultaneous and free . . . We are of opinion that the defendant must be regarded in this suit as a citizen of Illinois, and therefore as having had no right to remove."

This Court has established certain definite rules. A corporation freely formed in two or more states is regarded as a citizen of each of them in determining questions of diversity of citizenship. This is based on the separate legal entity theory.

If a suit is brought in an incorporating state, the corporation is treated as a citizen thereof. It follows that if a suit is brought in an incorporating state by a citizen of another state, there is diversity, even though the plaintiff and defendant are citizens of the other state.

"Thus, a multi-state corporation can neither sue in nor remove to a federal court in an incorporating

state when the other party is a citizen of that state." 64 Harv. L. Rev. 1009, 1010 (1951).

Lower federal courts have followed these basic rules. In *Boston & Maine R. R.* v. *Hurd,* 108 Fed. 116 (1st Cir. 1901), cert. denied 184 U. S. 700, a Massachusetts citizen was allowed to sue in federal court in New Hampshire a railroad incorporated in both states. The same rule was adhered to in *Peterborough* v. *Boston & Maine R. R.,* 239 Fed. 97 (1st Cir. 1917), and in *Boston & Maine R. R.* v. *Breslin,* 80 F. 2d 749 (1st Cir. 1935), cert. denied 297 U. S. 715.

The Second, Fourth, Sixth, Seventh and Eighth Circuits agree with the First Circuit. *Lucas* v. *New York Cent. R. Co.,* 88 F. Supp. 536 (S. D. N. Y. 1950); *Murphy* v. *Hudson & Manhattan R. Co.,* 45 F. Supp. 720 (E. D. N. Y. 1942); *Town of Bethel* v. *Atlantic C. L. R. Co.,* 81 F. 2d 60 (4th Cir. 1936), cert. denied 298 U. S. 682; *Lake Shore & M. S. Ry. Co.* v. *Eder,* 174 Fed. 944 (6th Cir. 1909); *Starke* v. *New York, Chicago & St. Louis R. Co.,* 180 F. 2d 569 (7th Cir. 1950); *Missouri Pac. Ry. Co.* v. *Meeh,* 69 Fed. 753 (8th Cir. 1895).

Writers have recognized these principles. "But where a corporation is chartered by two States the corporation which acts in each State is the corporation there chartered . . . Suit against such a consolidated corporation in one of the States which has chartered it is therefore suit against a corporation of that State." Joseph H. Beale, Jr., *Corporation of Two States,* 4 Col. L. Rev. 391, 406 (1904). See Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928), §65, pp. 203-204; Williams, *A Treatise on*

Federal Practice (2nd ed. 1927), §13, pp. 169-170; Rose, *Jurisdiction and Procedure of the Federal Courts* (4th ed. 1931), §272, pp. 259-260; Brown, *Guide to Federal and Bankruptcy Practice* (1933), §10, p. 71. The basis of the separate legal entity theory is discussed in *Multiple Incorporation as a Form of Railroad Reorganization,* Comment, 46 Yale L. J. 1370 (1937). A multiple corporation should be treated as a citizen of all the states in which it is truly incorporated, which is in line with the policy in favor of limiting diversity jurisdiction. Note, *The Effect of Multiple Incorporation on Access to the Federal Courts,* 44 Harv. L. Rev. 1106 (1931).

In the last thirty years, elimination or restriction of diversity jurisdiction has frequently been advocated.[1] Today the diversity problem insofar as it concerns multi-state corporations affects only railroads. 46 Yale L. J. 1370, 1382 n. 88, *supra.* Under modern consolidation statutes, multi-state corporations are no longer created. 25 Tulane L. Rev. 126 (1950).

The basic rules enunciated by this Court have now been long established and have never been altered despite many attempts in Congress to do so. Any change in these rules should be accomplished by re-

[1] See Frankfurter and Landis, *The Business of the Supreme Court of the United States,* 40 Harv. L. Rev. 834, 871, 1111 (1927); Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 Harv. L. Rev. 483 (1928); McGovney, *A Supreme Court Fiction,* 56 Harv. L. Rev. 853, 1090, 1225 (1943); Frankfurter, *Distribution of Judicial Power between United States and State Courts,* 13 Corn. L. J. 499 (1928); Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49 (1923); Warren, *Corporations and Diversity of Citizenship,* 19 Va. L. Rev. 661 (1933); Comment, *Statutory Merger and Consolidation of Corporations,* 45 Yale L. J. 105 (1935).

vision of the Judicial Code. No constitutional question is involved and Congress may modify the jurisdiction. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233-234 (1922).

We submit, therefore, that in this case the plaintiff and defendant should be treated as citizens of Massachusetts. Neither of them can complain of an unfriendly state forum. A contrary decision would unnecessarily extend diversity jurisdiction, add to overcrowded federal calendars, and disregard state independence on a matter of state law.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

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R. M. PEET,
N. W. DEERING,
Of Counsel.

New York, N. Y., January 27, 1954.

APPENDIX

Conn. Public Acts, 1871, Chap. 129.

An Act in addition to an Act entitled An Act concerning Communities and Corporations.

WHEREAS, for their common benefit and interest, and for the convenience and benefit of the public, the New York and New Haven railroad company and the Hartford and New Haven railroad company, did on the 3d day of August, 1870, enter into certain perpetual covenants and agreements, under authority of and in accordance with the statute laws of this state, which covenants have been fully adopted and approved by the unanimous vote of the stockholders of said Hartford and New Haven railroad company, and by the vote, almost unanimous, of the stockholders of said New York and New Haven railroad company; which covenants and agreements have merged the entire railways and properties of said corporations into a joint estate, and have brought the management of both of said corporations under a common board of managers, and have secured perpetually the income of both said roads to be a common fund for the expenses, and liabilities, and dividends, of both companies, and as it would be for the convenience and best interest of said companies, and of the traveling and shipping public having dealings with them, that said companies should have a single corporate existence: therefore,—

Be it enacted, etc.:

SECTION 1. The Hartford and New Haven railroad company may sell, transfer, merge, and consolidate

its corporate rights, powers, and estate, to, into, and with the New York and New Haven railroad company, upon such consideration, terms, stipulations, and conditions, as may be agreed upon between said corporations, and are authorized by the provisions of this act.

SEC. 2. The directors of said corporations may, in the names and under the seals of their respective corporations, enter into joint articles of agreement for the sale, transfer, purchase, merger, and consolidation hereby authorized, prescribing the considerations, terms, and conditions thereof, the mode of effecting such transfer, merger, and consolidation, the name of such consolidated corporation, and the number of directors thereof, which shall not be more than twenty-one, nor less than nine, a majority of whom shall be citizens residing in this state, and the persons who shall act as such directors until the next regular election of directors by said consolidated corporation, the number of shares, and the amount of the capital stock of said consolidated corporation, which shall not exceed the present authorized capital of said companies, the manner of converting the capital stocks of said original corporations into the capital stock of the consolidated corporation, and the compensation to be made for fractional parts of shares, and such other matters, things, and details, as may be necessary or proper to effect the purposes and merger aforesaid.

SEC. 3. Said agreement of the directors hereinbefore authorized shall be submitted to the stockholders of each of said corporations separately, at a meeting specially called for that purpose, and if approved by a vote of at least two-thirds of the stock represented at each of the said meetings, and not other-

wise, said agreement made by said directors shall become the agreement of said corporations respectively, and a certified copy thereof, together with a certificate of the adoption of said agreement by the stockholders of said respective corporations, under the hand of the secretary of each of said corporations, shall be filed in the office of the secretary of this state, and thereupon said Hartford and New Haven railroad company shall be and become merged and consolidated in and with said New York and New Haven railroad company; and said consolidated corporation shall continue a body politic and corporate, under the corporate name of the New York, New Haven and Hartford railroad company, and shall possess, hold, and enjoy all the rights, powers, franchises, and privileges theretofore vested in either of said corporations; and all the property, real and personal, including all rights of way and rights of action, belonging to either of said corporations, shall be deemed and taken to be transferred to and vested in the corporation into which such merger is made, without further act or deed to be done, executed, or performed: *provided,* that nothing in this act shall be so construed as to authorize said last named corporation to merge, consolidate, or make joint stock with any other railroad company, or make perpetual lease with any such railroad, without consent of the general assembly first had and obtained.

SEC. 4. All rights of creditors and all liens upon the property of either of said original corporations, shall continue unimpaired, and all debts, contracts, and liabilities of either of said original corporations shall attach to, and become binding upon such consolidated company, and may be enforced in the same manner, and to the same extent, as if contracted or

incurred by said latter corporation; and said original corporations shall at all times be taken to be in existence in their original names and capacities for the enforcement of any and all claims in favor or against either of said corporations.

SEC. 5. If any stockholder of either of said original corporations shall, at said meeting of stockholders, or within sixty days thereafter, object to such proposed transfer and merger, and signify to such corporation his objections in writing, such stockholder, or said consolidated corporation may, if said contract of merger shall have been approved and taken effect as aforesaid, at any time thereafter, apply by petition in writing, to any judge of the superior court to appoint one or more disinterested persons to appraise the value of the shares or share of such stockholder, and said judge—reasonable notice first being given to the adverse party, which notice said judge is authorized to prescribe—shall appoint one or more disinterested persons to make such appraisal; and said person or persons so appointed shall, under oath, appraise the value of said stock, and make return thereof in writing under his or their hands, to said judge, who shall lodge the same with the clerk of the superior court, in the county in which such application shall be made, and said clerk shall record the same; and when so returned and recorded, such appraisement shall have the effect of a judgment, and execution may issue therefor in favor of such stockholder against said corporation; and said appraisement shall be paid in full by said corporation to said stockholder if to be found within this state; if not, then to the treasurer of the state, who is hereby authorized to receive and hold the same on deposit for the use, and to the order of such stockholder; and

when said appraisement shall have been so paid or deposited as aforesaid, said stockholder shall cease to have any further interest therein, and shall, on demand made, surrender said stock and all certificates thereof to said corporation; and the fees of said appraisers and of said clerk, shall be taxed by said judge and paid by said corporation.

SEC. 6. Said consolidated corporation shall be subject to the charter of the corporation into which such merger is made, as such charter may be modified by such agreement of merger, and by the provisions of this act: *provided, however,* that when a special duty, liability, or burden is imposed, or any special privilege, franchise, or immunity conferred on the corporation so merged, as aforesaid, by its charter, such duty, liability, or burden shall, until otherwise ordered, attach to, and be discharged by, and such franchise, immunity or privilege be enjoyed by such consolidated corporation, so far as the same were applicable to the road and franchise of said merged corporation.

SEC. 7. Said consolidated corporation shall ticket passengers, check baggage, way bill freight, transfer cars, and give equal facilities for the convenient transfer of passengers, baggage, and freight, to and from all connecting railroads, and shall make no unequal discrimination for or against either of said railroads in its joint passenger and freight rates, or in the division of said rates.

SEC. 8. Said consolidated corporation shall at all times be subject to the power, control, and legislation of the general assembly of the state.

SEC. 9. This act shall take effect upon its passage.

Approved, July 26th, 1871.

Mass. Acts and Resolves, 1872, Chap. 171.

An Act to authorize the Hartford and New Haven Railroad Company to consolidate with the New York and New Haven Railroad Company.

Be it enacted, etc.:

SECTION 1. The Hartford and New Haven Railroad Company may sell, transfer, merge and consolidate its corporate rights, powers and estate to, into and with the New York and New Haven Railroad Company, upon such considerations, terms, stipulations and conditions as may be agreed upon between said corporations and as are authorized by the provisions of this act.

SEC. 2. The directors of said corporation may enter into proper agreements for the sale, transfer, purchase and merger hereby authorized, prescribing the terms and conditions thereof, the mode of effecting such transfer, merger and consolidation, and the number of directors thereof, one or more of whom shall be citizens of this Commonwealth, the amount of the capital stock of such consolidated corporation, which shall not exceed the present capital of said companies, the manner of converting the capital stock of said original corporations into the capital stock of said consolidated corporation, and such other matters and things as may be necessary or proper to effect the purposes and merger aforesaid: *provided, however,* that such agreement of the directors hereinbefore authorized shall be submitted to the stockholders of each of said corporations separately, at meetings specially called for that purpose, and, if approved by a vote of at least two-thirds of the stock represented at each of

said meetings, said agreement so to be made by said directors shall become the agreement of said corporations respectively, and a certified copy thereof, together with a certificate of the adoption thereof by the stockholders of said respective corporations, under the hand of the secretary of each of said corporations, shall be filed in the office of the secretary of this commonwealth.

SEC. 3. Upon the filing of such certificate said companies shall become and be merged and consolidated into one corporation, under the name of the New York, New Haven and Hartford Railroad Company, and shall become and be a body politic and corporate, and shall possess, hold, and enjoy all the rights, powers, franchises and privileges, theretofore vested in either of said corporations, and all property, real and personal, of said companies, shall be deemed to be vested in said consolidated corporation.

SEC. 4. All rights of creditors and all liens upon the property of either of said corporations shall continue unimpaired, and all debts, contracts and liabilities of either of said corporations shall continue unimpaired, and shall attach to and become binding upon such consolidated company, and may be enforced in the same manner and to the same extent as if incurred by said latter corporation, and in the courts of Massachusetts in all cases in which the claimants shall so elect.

SEC. 5. Said consolidated corporation shall be subject to the charter of the corporation into which such merger is made: *provided, however,* that when a special duty or liability is imposed, or any special franchise, privilege or immunity is conferred on the corporation so merged by its charter, such duty or

liability shall attach to and be discharged by, and such franchise, immunity or privilege be enjoyed by such consolidated corporation, so far as the same is applicable to the road and franchise of said merged corporation.

SEC. 6. Said consolidated corporation shall ticket passengers, check baggage, way-bill freight, transfer cars and give full and equal facilities for the convenient transfer of passengers, baggage and freight, to and from all connecting railroads, and shall make no unequal discrimination for or against either of such railroads, or any railroad that may at any time meet or connect with the said consolidated railroad.

SEC. 7. Said consolidated corporation shall at all times be subject to the legislature of this state as to that portion of its road in this state, as heretofore; and shall be subject to the general laws of this state as to its whole road so far as such laws may be applicable thereto.

SEC. 8. The provisions of the eleventh section of the charter of the New York and New Haven Railroad Company shall remain in force and apply to that portion of the road of the consolidated company which is now the New York and New Haven Railroad, and, for the purposes contemplated in that section, the portion of the consolidated road which is now the Hartford and New Haven Railroad, shall forever be considered a connecting road.

SEC. 9. This act and any act regarding the said consolidated corporation, shall be subject to alteration, modification or repeal by the legislature.

SEC. 10. This act shall take effect upon its passage.

Approved, April 5, 1872.

No. 404. JACOBSON, ADMINISTRATRIX, *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. Certiorari, 346 U. S. 895, to the United States Court of Appeals for the First Circuit. Argued February 3, 1954. Decided February 8, 1954. *Per Curiam:* The judgment is affirmed. *Patch* v. *Wabash R. Co.*, 207 U. S. 277; *Memphis & Charleston R. Co.* v. *Alabama*, 107 U. S. 581; *Seavey* v. *Boston & Maine R. Co.*, 197 F. 2d 485. *George P. Lordan* argued the cause for petitioner. With him on the brief was *Herbert E. Tucker, Jr.* *Edward R. Brumley* argued the cause for respondent. With him on the brief were *R. M. Peet* and *N. W. Deering*. Reported below: 206 F. 2d 153.